IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 717

THE OHIO NATIONAL LIFE INSURANCE COMPANY, a corporation, LESLIE C. SMALL and MAY SMALL INGLESH,

Petitioners,

vs.

BOARD OF EDUCATION OF GRANT COMMUNITY HIGH SCHOOL DISTRICT NO. 124 OF LAKE COUNTY, ILLINOIS; ARTHUR H. FRANZEN, as treasurer of Grant Community High School District No. 124 of Lake County, Illinois; ARTHUR G. HIGHGATE, LADDIE RASKA, WILLIAM G. NAGLE, WILLIAM TONYAN and CHARLES BRAINARD, as members of the Board of Education of Grant Community High School District No. 124 of Lake County, Illinois; and JAY B. MORSE, as county clerk of Lake County, Illinois,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, The Ohio National Life Insurance Company, a corporation, Leslie C. Small and May Small

Inglesh, jointly and severally pray for the issuance of a writ of certiorari herein directed to the Supreme Court of Illinois to review a certain final decision of said Supreme Court of the State of Illinois, said opinion and decision having been rendered and filed on May 16, 1944, and a petition for rehearing in said matter having been denied on September 14, 1944. A certified copy of the transcript of the record in this case, including the proceedings of the Appellate Court for the Second District of Illinois and the Supreme Court of Illinois, together with a supporting brief annexed hereto, are filed herewith in this court within three months after denial of said petition for rehearing by the said Supreme Court of the State of Illinois.

I.

Summary and Short Statement of the Matter Involved.

Grant Community High School District No. 124 of Lake County, Illinois, issued $54,000 funding bonds to pay certain claims incurred by it on account of material and equipment furnished in the construction of a school house (R. 109-110). Petitioner, The Ohio National Life Insurance Company, of Ohio, is the owner of $33,000 principal amount of said bonds, and Leslie C. Small and May Small Inglesh are jointly the owners of $15,000 principal face amount of said bonds.

In the year 1932 a taxpayer of Lake County, Illinois, filed objections to the taxes extended against his property in order to pay the interest on said bonds. Upon hearing, the County Court of Lake County, Illinois, sustained the tax but on appeal to the Supreme Court of Illinois (February Term, 1934) the tax was held invalid (*People* v. *Orris*, 358 Ill. 408, 193 N. E. 213).

After this decision the General Assembly of the State of Illinois passed a validating act, effective July 1, 1935, by which the said bonds were sought to be validated (Appendix E). The validating act sought to cure two objections made by the Supreme Court of Illinois in that decision which were that the bonds had not been submitted to a vote, and second, that they were in excess of the statutory 2½ per cent indebtedness limit.

In 1936 petitioner, The Ohio National Life Insurance Company, brought suit against the Board of Education of Grant Community High School District in the District Court of the United States for the Northern District of Illinois, Eastern Division, in Case No. 45263, to recover judgment for past due interest on certain of said bonds (R. 104-106). In the complaint filed, the validating act was set up (R. 105) and by the sworn answer the validity of the bonds and the validating act were placed in issue (R. 106-107). The district court acquired jurisdiction of the parties, the subject matter and the cause. In June, 1936, after a full hearing before the court, judgment was entered in favor of petitioner, The Ohio National Life Insurance Company, for the face amount of all of the interest coupons then past due and sued upon (R. 107-108). The school district did not appeal from that judgment. Subsequently, it paid the judgment.

Thereafter, the school district paid all interest coupons maturing on or before September 1, 1939.

In 1939 a taxpayer of Lake County, Illinois, filed objections to the taxes extended against his property in order to pay the interest on these bonds. The County Court of Lake County, Illinois, sustained the tax, but on appeal to the Supreme Court of Illinois the tax was again held

invalid (*People* v. *Orvis*, 374 Ill. 536; 30 N. E. 2d 28), and the cause was remanded with directions that the taxpayer be given leave to file his objections. A petition for writ of certiorari to review that judgment was filed in this court and denied on the specific ground that the judgment was not final.

On March 1, 1940, the school district defaulted in the payment of interest coupons due on that date. Notwithstanding repeated demands by the holders of the bonds, the Board of Education and its treasurer refused to make any payments of interest as the coupons respectively became due after March 1, 1940.

On November 8, 1941, petitioner, The Ohio National Life Insurance Company, filed its complaint in the Circuit Court of Lake County, Illinois, making the respondents herein defendants and praying that the court issue a writ of mandamus against the school board and the treasurer to pay the interest coupons then past due from the money in the hands of said treasurer (which was sufficient for that purpose); to compel the county clerk of Lake County to make the necessary extension of taxes within the school district to pay the interest and principal of bonds then and thereafter to become due; to enjoin the Board of Education and the treasurer thereof from expending the moneys then in his hands (which had been levied and collected for the express purpose of paying part of these bonds or interest on them) for any purposes other than the payment of the interest and principal of said bonds; for a judgment for the principal plus interest of said bonds because of an anticipatory breach on the part of the said school district; and in the alternative for the recovery of a judgment for money had and received; and in the second alternative for the recovery of a judgment on

the doctrine of equitable subrogation. The complaint set forth the recovery of the judgment in the District Court of the United States for the Northern District of Illinois and averred that said determination of the district court was *res judicata* of the validity of the bonds.

Answers were filed on behalf of respondents and a counter-claim was filed by the Board of Education bringing in Leslie C. Small and May Small Inglesh as cross-defendants.

At the trial, the Circuit Court of Lake County, Illinois, on October 19, 1942, entered judgment in favor of petitioner, The Ohio National Life Insurance Company, in the sum of $32,422.50 and in favor of Leslie C. Small and May Small Inglesh, collectively, in the sum of $14,737.50, and in behalf of certain other cross-defendants for another sum. That court ignored the judgment of the District Court, but entered the foregoing judgments either on the doctrine of equitable subrogation or on the doctrine of money had and received.

An appeal was perfected by the Board of Education to the Appellate Court of Illinois for the Second District. Petitioners filed cross-errors in that Appellate Court, alleging *inter alia* that the Circuit Court of Lake County, Illinois, had ignored the judgment of the District Court of the United States in refusing to hold that that judgment was *res judicata* as to the validity of the bonds. Thereafter, on motion of petitioners, the cause was transferred to the Supreme Court of the State of Illinois on the ground that the validity of a statute was involved. In the Supreme Court of Illinois petitioners renewed their contention that the validity of the bonds had been adjudicated by the United States District Court, that such

judgment was *res judicata* of that question, and that said judgment was binding on the Board of Education (R. 162, 179).

On November 19, 1943, the Supreme Court of Illinois published an opinion allowing petitioners a partial recovery on the theory of equitable subrogation. The Board of Education then filed a petition for rehearing, which was allowed.

On May 16, 1944, the Supreme Court of Illinois, in the decision here sought to be reviewed, reversed the judgment of the Circuit Court of Lake County, Illinois, and remanded the cause with directions to enter a judgment. This decision held the bonds *pro tanto* valid and the balance invalid. The Supreme Court of Illinois refused to recognize the district court judgment and stated that "the Federal Court was not the forum where the constitutionality of the validating act could be finally determined" (R. 163). This petition for writ of certiorari is to procure a review of this decision of the Illinois Supreme Court.

II.

Basis on Which It Is Contended the Supreme Court of the United States Has Jurisdiction to Review the Judgment in Question.

The jurisdiction of this court is based on Section 237 (b) of the Judicial Code (28 U. S. C. A. 344 (b)) (Appendix F), which reads in part as follows:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination * * * any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision

could be had * * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of or commission held or authority exercised under, the United States; * * *"

1. The decision of the Supreme Court of the State of Illinois in this case of *The Ohio National Life Insurance Co., etc., et al., Appellees and Cross-Appellants,* v. *Board of Education of Grant Community High School, etc., Appellant and Cross-Appellee,* as rendered May 16, 1944 (rehearing denied September 14, 1944), is a final judgment of the highest court of the State of Illinois in which a decision could be had. (See brief on finality of this judgment.) Said decision held that out of the sum of $54,000.00 in bonds issued, $10,701.51 were *pro tanto* valid and the balance were invalid, and also permitted recovery of $956.32, being funds still held in the treasury of the district and never expended.

2. The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, in the case of *The Ohio National Life Insurance Company* v. *Board of Education of Grant Community High School District No. 124 of Lake County, Illinois,* rendered June 30, 1936, which held that the bonds in question were valid, is a right specially set up by the petitioners under authority exercised under the United States. The said judgment was pleaded and a duly authenticated copy thereof was introduced in evidence before the Circuit Court of Lake County, Illinois (R. 107-108) (Appendix D).

3. Petitioners, Leslie C. Small and May Small Inglesh, aver that the judgment of the district court holding the bonds valid is likewise available to them because of the

identity of interest of said petitioners with the insurance company.

4. The petitioners introduced in evidence the District Court judgment holding the bonds valid (R. 107-108) and insisted on it in the Circuit Court of Lake County, Illinois; also relied on it in the Appellate Court of Illinois; and again relied on it in the Supreme Court of Illinois both on appeal by cross-errors and in the answer to the school district's petition for rehearing and in its petition for rehearing. Nevertheless, the Supreme Court of Illinois expressly refused to recognize said District Court judgment.

5. The failure of the Supreme Court of Illinois to give full faith and credit to said District Court judgment using language as follows, "The Federal Court was not the forum where the constitutionality of the validating act could be finally determined," is in violence of Revised Statutes 905, 28 U. S. C. A. 687 (Appendix C), which require that judgments of the Federal Courts in a state shall have the same dignity in the courts of that state as those of its own courts.

6. The failure of the Supreme Court of Illinois to recognize the judgment of the United States District Court rendered June 30, 1936, is contrary to the following decisions of this court: *Stoll* v. *Gottlieb* (1938), 305 U. S. 165, 83 L. ed. 104; *Deposit Bank of Frankfort* v. *Board of Councilmen of Frankfort*, 191 U. S. 499, 48 L. ed; 276; *Dupasseur* v. *Rocherean*, 88 U. S. 130, 22 L. ed. 588; *Crescent City, etc. Co.* v. *Butchers Union, etc.*, 120 U. S. 141, 30 L. ed. 614; and *Motlow* v. *Missouri*, 295 U. S. 97, 79 L. ed. 1327.

III.

The Question Presented.

1. May the Supreme Court of the State of Illinois hold a portion of certain bonds void in a suit brought by the bondholder by expressly refusing to recognize the validity of a prior judgment entered by a District Court of the United States in a suit between the same parties sustaining the validity of the same bonds where said District Court had jurisdiction of the parties, the subject matter and the cause?

IV.

Reasons Relied Upon for Allowance of the Writ.

The Supreme Court of Illinois, in holding certain bonds partially void in a proceeding by bondholders against the Board of Education, expressly refused to recognize the validity and binding effect of a prior United States District Court final judgment holding the same bonds valid, entered in a case instituted by a bondholder against the school district and in which such district court had jurisdiction of the school district, the parties, the subject matter and the cause.

Wherefore, petitioners jointly and severally pray that a writ of certiorari be issued out of and under the seal of this court directed to the Supreme Court of the State of Illinois, sitting at Springfield, Illinois, commanding said court to send to this court on a day to be designated a full and complete transcript of the record and all proceedings of the Supreme Court of the State of Illinois had in this cause to the end that this cause may be reviewed and determined by this court; that the judgment of the

District Court of the United States be decreed to be *res judicata* as to the validity of the bonds, that the Supreme Court of Illinois and the Circuit Court of Lake County, Illinois, be directed to permit petitioners' recovery of the full amount of the bonds, together with interest past due; and that your petitioners be granted such other and further relief as may seem proper.

WERNER W. SCHROEDER,
Attorneys for Petitioners.

THEODORE W. SCHROEDER,
A. F. BEAUBIEN,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

No opinion was filed by the Circuit Court of Lake County, Illinois. The opinion of the Appellate Court of Illinois for the Second District transferring the cause to the Supreme Court of Illinois is printed in abstract form merely at 318 Ill. App. 646. But a full copy is attached (Appendix A). The opinion of the Supreme Court of the State of Illinois is reported in 387 Ill. 159 (Appendix B).

Jurisdiction.

The jurisdiction of this court is invoked under Section 237 (b) of the Judicial Code as amended. 28 U. S. C. A. 344 (b).

The Supreme Court of the State of Illinois (being the highest court of the State of Illinois) on May 16, 1944, reversed and remanded the judgment entered by the Circuit Court of Lake County, Illinois. Petition for rehearing was duly filed and was denied on September 14, 1944. The last two paragraphs of the decision of the Supreme Court of Illinois specifically direct what judgment (and the amount thereof) shall be entered by the lower court. It is the settled law of Illinois that when a decree is reversed with specific directions the lower court has no discretion but must make effective the judgment of the higher court. *Crozier* v. *Freeman Coal Min. Co.*, 363 Ill. 362 at 390; *Roggenbruck* v. *Breuhaus*, 330 Ill. 294 at 297; *People* v. *Militzer*, 301 Ill. 284 at 287; *P. C. C. & St. L. Ry. Co.* v. *Gage*, 286 Ill. 213 at 216-217; *Dunlap* v. *Pierce*, 260 Ill. App. 149 at 154.

It has also been held that if the cause is remanded with

directions to enter a particular judgment or decree, the lower court has no discretion in the matter and must enter it accordingly. Dodds & Edmunds "Illinois Appellate Practice," Sec. 1330; *Trustees* v. *Hoyt*, 318 Ill. 60 at 61; *Smith* v. *Dugger*, 318 Ill. 215 at 216.

A certified transcript of record, the petition for the issuance of writ of certiorari and supporting brief annexed thereto are filed herein with the clerk of this court within three months after denial of said petition for rehearing by the Supreme Court of Illinois.

Statement of the Case.

The essential facts have been fully set forth in the petition under the caption "Summary and Short Statement of the Matter," which is hereby adopted. Any necessary elaboration of the facts involved will be covered in the argument to follow.

Specification of Assigned Errors.

The Supreme Court of the State of Illinois erred:

1. In disregarding the prior judgment duly entered by the District Court of the United States for the Northern District of Illinois, Eastern Division, in a suit between the same parties and involving the same subject matter.

2. In holding certain bonds partially void, which had theretofore been adjudicated valid and binding by judgment of the District Court in favor of one of the parties and against the other in a proceeding wherein said court had jurisdiction of the subject matter, the parties and the cause.

3. In failing to hold that the decision of the District Court was *res judicata* as to the validity of the bonds.

4. In failing to recognize provisions of Section 905 United States Statutes, 28 U. S. C. A. 687.

SUMMARY OF ARGUMENT.

I.

Petitioner, by virtue of Section 237(b) of the Judicial Code as amended, is entitled to have a writ of certiorari issued.

II.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, in the case of *The Ohio National Life Insurance Company* v. *Grant Community High School District No.* 124, entered June 30, 1936, is *res judicata* as to the validity of the bonds involved in this case.

III.

The position of the Supreme Court of Illinois that the Federal Court was not the forum where the constitutionality of the act could be determined overlooks the distinction between rule of decision and *res judicata.*

ARGUMENT.

May It Please the Court:

I.

The District Court of the United States in 1936 entered judgment in favor of petitioner, The Ohio National Life Insurance Company, against the school district for interest due on certain bonds. The validity of the bonds was the essential issue in the case. The complaint filed in the Federal District Court is abstracted as follows:

> "Paragraph 3—After the bonds had been issued and sold, certain questions arose in a tax objection suit to which the holders of the bonds were not parties, concerning the validity of said bonds due to alleged irregularities in the proceedings had in connection with the issuance thereof. That thereafter, a certain validating act was passed by the General Assembly of the State of Illinois, approved June 6, 1935, which act is set out in the paragraph. And then the paragraph alleges that by reason of said validating act, all proceedings had in connection with the issuance of said bonds are expressly validated, and said bonds and the interest coupons thereto attached are valid and legally binding obligations of the defendant" (R. 105).

The answer, after admitting the issuance of the bonds and the failure to pay the interest, neither admitted nor denied the validity of the validating act and neither admitted nor denied that the bonds and interest coupons were valid and legally binding on the defendant district, which placed the burden of proof on the plaintiff. In the

5th paragraph of the answer the school district denied that the plaintiff was entitled to the relief prayed in the complaint (R. 107).

There was no quarrel as to the issuance of the bonds and no controversy as to the amount of unpaid interest coupons. The one and only issue was the validity of the bonds and the effectiveness of the validating act. It was necessary for the court to pass on that issue in order to uphold the bonds and allow the payment of interest.

There can be no escape from the conclusion that not only were the validity of the bonds and the validating act presented, but that that was the only controverted issue adjudicated by the Federal Court in that cause. Judgment could not have been entered by that court without upholding the effectiveness of the validating act and the legality of the bonds.

The Supreme Court of Illinois in holding the identical bonds partially void in this case refused to recognize the validity and binding effect of the judgment of the Federal District Court. Citing its previous decision in *People* v. *Orvis*, 374 Ill. 536, it said (R. 163):

> "The Federal Court was not the forum where the constitutionality of the validating act could be finally determined. It was held that the final determination of such questions was for the state courts and we now adhere to the holding in that case."

This court has repeatedly held that where the highest court of a state disregards a judgment or decree of a court of the United States, a federal question is thereupon raised which is reviewable by this court under Section 237(b) of the Judicial Code, 28 U. S. C. A. 344(b) (Appendix F).

In the recent case of *Stoll* v. *Gottlieb* (1938), 305 U. S. 165, 83 L. ed. 104, this court stated:

> "This certiorari was allowed to review a judgment of the Supreme Court of Illinois. That court had denied effect to a plea of *res judicata* arising from orders of a district court in bankruptcy. Provisions declaring the supremacy of the Constitution and the extent of the judicial power and authorizing necessary and proper legislation to make the grants effective confer jurisdiction upon this Court to determine the effect to be given decrees of a court of the United States in state courts. As the contention is that the ruling below disregarded decrees of a court of the United States it raised a federal question reviewable under No. 237(b) of the Judicial Code, 28 U. S. C. A. 344(b)."

See also *Dupasseur* v. *Rochereau*, 88 U. S. 130, 22 L. ed. 588; *Crescent City, etc. Co.* v. *Butchers Union, etc.*, 120 U. S. 141, 30 L. ed. 614; United States Revised Statutes, Section 905, 28 U. S. C. A. 687.

II.

After the decision of the Supreme Court of Illinois in 1934 (*People* v. *Orvis*, 358 Ill. 408, 193 N. E. 213), in which it held that a tax levied to pay these bonds was invalid, the General Assembly of Illinois passed the 1935 validating act (Appendix E).

The District Court case was filed by The Ohio National Life Insurance Company after that act was in force and effect. In the complaint in that court that act was set forth in full and by the sworn answer of the School District over the hand of its secretary its effectiveness was put in issue. It was passed on by the district court during the trial of the case.

The inevitable effect of the decision of the District Court was to hold that the bonds were validated by that act of the General Assembly and were valid and binding obligations of the School District. Prior to the District Court case the validating act had not been construed or adjudicated by any court. The Supreme Court of Illinois itself has held in *People* v. *Lawson*, 351 Ill. 507 at 509, that the doctrine of *res judicata* applies to all questions of fact or law, including constitutional as well as all other questions.

In total disregard of the judgment of the District Court the Supreme Court of Illinois erroneously stated in this case (R. 163):

> "The issues, as raised by the pleadings, show that the insurance company relied upon the validating act of June, 1935, in support of its claim that there was interest due on its bonds. But from the pleadings of that case, appearing as evidence in this action, it does not appear that any question was raised as to the validity, construction or application of said validating act. The judgment entered permitted a recovery upon the assumption that the act was valid."

If, as stated in that quotation, the issue of the validity of the bonds was raised by the pleadings and the insurance company relied upon the validating act of 1935 in support of its claim, how can it be said that it was not necessary for the court to construe the effect of that act? The court could not avoid holding that act and the bonds valid in order to adjudge the payment of interest.

By what appears to be an inconsistency, the Supreme Court of Illinois in its opinion admits that the Federal Court judgment is conclusive as to the amount of interest sued for. The pleadings, as pointed out, aver the validity

of the bonds. If the bonds were invalid there certainly could be no recovery of interest. On the other hand, if there could be recovery of interest, it could be only because the bonds were valid. The validity of the bonds was necessarily the basic issue.

It is therefore respectfully submitted that the validity of the bonds was placed in issue and was the basic issue in the federal court as was the validity of the validating act, and that those issues were decided in favor of the plaintiff insurance company.

Under the doctrine of *Hanna* v. *Read*, 102 Ill. 596, the privity between the insurance company and the Smalls was such as to give the latter also the advantage of that adjudication.

The Supreme Court of Illinois has overlooked the decisions of this court in *Deposit Bank of Frankfort* v. *Board of Councilmen of Frankfort*, 191 U. S. 499, 48 L. ed. 276, and *Stoll* v. *Gottlieb*, 305 U. S. 165, 83 L. ed. 104.

In the *Frankfort* case a decree of the federal court granting exemption from taxes under the so-called Hewitt Law of Kentucky was held to be a conclusive adjudication and to constitute exemption from taxes notwithstanding a later decision of the Supreme Court of Kentucky in *Deposit Bank of Owensboro* v. *Daviess County*, 102 Ky. 174, 44 S. W. 1131, holding that that statute did not grant exemption. It was held that since the federal court decree had never been reversed it constituted a bar against the further collection of taxes from that taxpayer. The later contrary opinion of the highest court of Kentucky involving the same statute did not deprive that decree of its effect.

So, also, in *Stoll* v. *Gottlieb*, above cited, this court overruled the Supreme Court of Illinois, and held that a decree of the federal district court upholding the jurisdiction to cancel a guarantee was conclusive and binding upon the courts of Illinois.

It may be stated that the federal district court, in upholding the effectiveness of the validating act, was supported by ample authority in Illinois and elsewhere.

The 2½ per cent indebtedness limit was statutory. The constitutional limit of indebtedness of municipalities in Illinois is 5 per cent. The first effort to reduce the limit by statute to 2½ per cent was held unconstitutional in *Michaels* v. *Hill*, 328 Ill. 11. A later debt limitation act was passed in 1928, which in part is still effective.

With reference to submission to the voters: the constitution of Illinois, as recognized by the opinion of the Supreme Court of Illinois here under consideration, does not require a vote of the people on any bond issued by a municipality.

The general rule as to validation, applied to municipal bonds in the note in 132 A. L. R. 1388, that the legislature may by retroactive statute legalize the unauthorized acts and proceedings of subordinate municipal agencies where such acts and proceedings might have been previously authorized by the legislature, is supported by many Illinois cases such as *People* v. *Militzer*, 272 Ill. 387; *People* v. *Madison*, 280 Ill. 96; *People* v. *Dix*, 280 Ill. 158; *People* v. *Howell*, 280 Ill. 477; *People* v. *Fifer*, 280 Ill. 506; *People* v. *Stilt*, 280 Ill. 553; *People* v. *Craft*, 282 Ill. 483; and particularly with reference to taxes in *People* v. *Matthews*, 282 Ill. 85; *People* v. *Railroad Company*, 284 Ill. 87; and with reference to bonds in *Worley* v. *Idleman*, 285 Ill. 214; and

also generally in *Fisher* v. *Fay*, 288 Ill. 11; *People* v. *Edwards*, 290 Ill. 464; *People* v. *Opie*, 301 Ill. 11; *People* v. *Graham*, 301 Ill. 446; *People* v. *Railroad Company*, 323 Ill. 536; *People* v. *Railroad*, 324 Ill. 43; *People* v. *Padley*, 340 Ill. 314; *People* v. *Railway Company*, 349 Ill. 476; *People* v. *Railway Company*, 368 Ill. 199; and *Krause* v. *Peoria Housing Authority*, 370 Ill. 356.

Those cases cover many types of validation, including validation of school districts originally organized under unconstitutional statutes, as well as bonds issued and taxes levied by such districts. Since the legislature could originally have authorized a debt over 2½ per cent and could have permitted the issuance of bonds without referendum, the validation here was proper and lawful.

There is a second line of cases in Illinois which has developed largely since the entering of judgment by the Federal District Court, which seems to proceed on the theory that only those acts may be validated which originally had authority in legislation previously passed. Such a case is *People* v. *C. & E. I. Railway Company*, 343 Ill. 101. In some of those cases the statement is made that a "void" proceeding cannot be validated. But that is inconsistent with the long line of decisions, above cited, in many of which school districts formed and taxes levied under unconstitutional statutes were permitted to be validated. Nothing could have been more "void" than such districts and taxes.

The two lines of cases are logically irreconcilable, but the former line is certainly in accordance with the larger number of authorities. 132 A. L. R. 1388.

This court in *Bolles* v. *Town of Brimfield*, 120 U. S. 759, 30 L. ed. 786, and *Anderson* v. *Town of Santa Anna*, 116

U. S. 356, 29 L. ed. 633, had found the law of Illinois on validating acts to be that "the legislature may by retroactive statutes legalize the unauthorized acts and proceedings of subordinate municipal agencies where such acts and proceedings might have been previously authorized by the legislature." That was in accord with the larger number of Illinois cases above referred to. If other cases in Illinois be construed to be in conflict with that rule, then the doctrine stated in *Hines Trustees* v. *Martin*, 268 U. S. 458, 69 L. ed. 1050 at 1053, would be applicable. It is said:

> "Where state decisions are in conflict, or do not clearly establish what the local law is, the Federal court may exercise an independent judgment and determine the law of the case."

These authorities establish that the federal court was right in its decision. But the important consideration is that it did enter a judgment and that judgment is *res judicata* between the parties under the authorities cited in the earlier part of this division of the Argument.

III.

The Supreme Court of Illinois in its opinion says: "The Federal Court was not the forum where the constitutionality of the validating act could be finally determined."

The reasoning implicit in that statement confuses "rule of decision" with *res judicata*. Had the validating act of 1935 been adjudicated by the Supreme Court of Illinois prior to the federal court proceeding, the rule of decision might have been applicable, but that was not the situation. The question came originally before the federal court. It was necessarily adjudicated between the parties to this litigation. That adjudication established a legal relationship between the parties which the Supreme Court

of Illinois cannot sever or modify. The case of *Deposit Bank of Frankfort* v. *Board of Councilmen of Frankfort*, 191 U. S. 499, 48 L. ed. 276, amply sustains this position, as does *Stoll* v. *Gottlieb*, 305 U. S. 165, 83 L. ed. 104.

The position thus taken by the Supreme Court of Illinois is clearly erroneous.

The Federal District Court had just as complete original jurisdiction to determine the question of the validity of the statute as would the state court had the suit been brought there. The jurisdiction of the two courts was concurrent.

In the case of *Ex parte McNeil*, 20 L. ed. 624 at 626, the court said:

> "A state law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal whether it be a court of equity of admiralty, or of common law. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our national jurisprudence. A party forfeits nothing by going into a Federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles and its determination is governed by the same considerations, as if it had been brought in the proper state tribunal of the same locality. *Robinson* v. *Campbell*, 3 Wheat. 223; *U. S.* v. *Knight*, 14 Pet. 315; *The Orleans* v. *Phoebus*, 11 Pet. 184; *Thompson* v. *Phillips*, 1 Bald. 272, 204; *Lorman* v. *Clarke*, 2 McLean 568; *Ex parte Biddle*, 2 Mass. 472; *Johnston* v. *Vandyke*, 6 McLean 423; *Prescott* v. *Nevers*, 4 Mass. 327; *Clark* v. *Sohier*, 1 Woodb. & M. 368."

The Federal Court, having had jurisdiction of the parties and subject matter, had the duty to determine the constitutionality of the validating act. The judgment of that court is entitled to full faith and credit and is *res judicata* in any other court.

In *Stoll* v. *Gottlieb, supra,* Mr. Justice Reed stated at page 107:

> "The Congress enacted, as one of the earlier statutes, provisions for giving effect to the judicial proceedings of the courts. This has long had its present form. This statute is broader than the authority granted by Article Four, section one, of the Constitution to prescribe the manner of proof and the effect of the judicial proceedings of states. *Under it the judgments and decrees of the Federal courts in a state are declared to have the same dignity in the courts of that state as those of its own courts in a like case and other similar circumstances.*" (Italics ours.)

In conclusion we submit that if the Supreme Court of Illinois is permitted to disregard the judgment of the District Court, the rights of citizens of the United States to have their rights adjudicated by a court set up under the authority of the United States is in effect abrogated.

For the foregoing reasons, it is respectfully submitted that the writ of certiorari prayed by the petitioners should be granted.

Respectfully submitted,

WERNER W. SCHROEDER,
Attorney for The Ohio National Life Insurance Company, Leslie C. Small and May Small Inglesh.

THEODORE W. SCHROEDER,
A. F. BEAUBIEN,
Of Counsel.

APPENDIX A.

Decision of Appellate Court of Illinois.

Per Curiam:

This cause is here on appeal from judgments of the Circuit Court of Lake County rendered against the Board of Education of Grant Community High School District No. 124 of that county, for $32,440.50 in favor of The Ohio National Life Insurance Company, $14,737.50 in favor of Leslie C. Small and May Small Inglesh and $5,895.00 in favor of the Unity of Bohemian Ladies, a corporation. All the defendents except the corporation last named, have filed a cross appeal.

The suit grows out of a $54,000.00 bond issue of the school district under date of March 1, 1931. This was preceded by another bond issue of $72,000.00, pursuant to an election in December, 1929, on the propositions of building a school house, purchasing a site and issuing bonds to that amount. After ascertaining that the $72,000.00 would not be sufficient to complete the building and equipment, and after the fund was exhausted by payments and contracts covering that amount, the board of education let contracts for extras in excess of $53,000.00 and by so doing the statutory limit of two and one-half per cent was exceeded. The $54,000.00 bonds, due serially from September 1, 1941 to September 1, 1950, bearing interest at five and one-half per annum, were then issued, without submitting the proposition to the voters of the district, and the proceeds were used to pay the claims for these extras. A resolution, adopting a schedule of annual tax levies for the payment

of the principal and interest of the bonds, was passed and filed with the county clerk.

All the $54,000.00 bonds are owned by appellees in separate holdings in proportion to the aggregate amounts of the judgments. The suit was instituted by the Ohio National Insurance Company in November, 1941. The first two counts of the complaint respectively pray that a writ of mandamus issue compelling the members of the school board and the treasurer to pay the accrued interest for 1940 and 1941, out of the moneys levied, collected and on hand for that purpose, and that a like writ issue compelling the county clerk to extend taxes for the year 1941 in accordance with the levy resolution. The first count also alleges the recovery of a judgment of $3025.00 by the plaintiff against the defendent in the United States District Court for the Northern District of Illinois, on June 30, 1936, for interest on the bonds held by it, and that judgment was paid by appellant and is *res adjudicata.* The third count prays an injunction restraining the members of the school board and the treasurer from expending the money so on hand for any other purpose. The fourth count alleges repudiation by appellant of the obligation of the bonds and the acceleration of their maturity by virtue thereof. The fifth count is for the money had and received, and the sixth count is for equitable subrogation to the right of the persons and corporations furnishing extras, to pay for which the bonds were issued.

Appellant filed a counter claim to recover interest theretofore paid on the bonds up to September 1, 1939, making the other appellees additional defendants thereto, and the added counter defendants also filed counterclaims similar to the original complaint. Answers to the complaint, and to the several counter claims, and replies to the answers

were filed. The issues thus made were submitted to the Court, without a jury and upon the trial, the court held that under prior decisions of the Supreme Court the bonds themselves were illegal and there could be no recovery thereon and dismissed the first three counts of the complaint and the counter claims of the appellant, and entered judgment as hereinbefore set out, requiring appellees to deposit their bonds with the clerk of the court, to be cancelled and returned to appellant upon payment and satisfaction of the judgment.

A motion in this Court by the appellees and cross-appellants to transfer this cause to the Supreme Court on the ground that the validity of a statute is involved was taken with the case. In their brief counsel for appellant states that on one or more of the counts for money had and received and for equitable subrogation, and upon the fourth count for anticipatory breach, the court found appellant indebted to the respective appellees in the several amounts of the judgment, and arrived at the amounts of recovery by finding that appellant is indebted for the amounts of the bonds, and interest at the rate of five per cent per annum from their date to March 1, 1940, when appellant repudiated the obligation to exchange the taxes collected for that purpose for the interest coupons, and deducted the amount of the first seventeen coupons. Five per cent is the statutory rate for vexatious delay in payment, as contrasted with the rate of five and one-half per cent called for by the bonds.

Appellant's answer denies the judgment of the United States District Court in res adjudicata and invokes the decisions of the Supreme Court of this State in the *Orvis* cases as a defense, and takes the same position on this appeal. In the first *Orvis* case, (*People* v. *Orvis*, 358 Ill.

408) the objections of a taxpayer to the 1932 tax levy on account of these bonds were upheld on the ground that the act of April 30, 1931 (Ill. Rev. Stat. 1941, chap. 122 par. 406s), under which the People claimed the bonds were issued, was inapplicable, because it did not by its authorization to issue bonds in excess of the two and one-half per cent limitation "for any purpose now authorized by law," authorize such an issue to pay claims in excess of the statutory limitation, but merely removed such limitation, in cases coming within its terms, as to bonds issued after the passage of the act, pursuant to antecedent proceedings, and did not authorize the issue of bonds without a vote of the electorate. The validating act of 1933 (Cahill's Stat. 1933, chap. 122, par. 446 (13), was also held inapplicable, because it provided only for the issue of bonds "for the purpose of funding and paying legal claims."

After the decision in the first *Orvis* case, another validating act was passed in 1935, (Ill. Rev. Stat. 1937, chap. 122, par. 406y), which the Supreme Court held invalid in the second *Orvis* case (*People* v *Orvis,* 374 Ill. 536), as an attempt to validate claims theretofore held by the first *Orvis* case to be invalid. This case was also decided on the objections in 1939, of the same taxpayer ot taxes levied on account of the same bonds. The court also held in that case that on account of the limitations of the Federal Judiciary act (1 Stat. at Large 92, chap. 20, sec. 34; Rev. Stat. sec. 721; U. S. C. A., title 28, sec. 725), the judgment of the United States Circuit Court was not controlling.

The reply to appellant's answer to the complaint denies that the *Orvis* cases are binding on the insurance company, because it was not a party to either of these actions, and denies that those decisions are a bar to its cause of action and alleges that the Supreme Court failed to give faith

and credit to the judgment entered in the United States District Court, in violation of Revised Statutes 905, 28 U. S. C. A. 687, requiring that judgment of the Federal Courts in a state shall have the same dignity in the courts of that state as those of its own courts.

It was stipulated between the parties that either side might offer proofs of any fact or facts materially relevant, and might insist on any claim or defense that was brought to the attention of the court, the same as though it were pleaded.

The notice of cross-appeal embraces the following points: The court should find the bonds issued are valid and subsisting obligations of the school district and should have entered judgment on the interest coupons as prayed in the complaint; the writ of mandamus prayed against the county clerk, and the injunction prayed should be issued; the judgment of the United States District Court is *res adjudicata*, and interest should have been allowed to the date of the judgment.

The motion to transfer the cause alleges as grounds therefor, that this cause involves in the first instance, the validity of the bonds which were attempted to be validated by the act of 1935, and that the validity of the bonds depends, under at least one theory, upon the validity of that act; that while the act of 1935 was held invalid in the tax objection suits, that decision is not binding on the bondholders who are now for the first time before the court; that they are entitled to have the validity of the 1935 act determined *de novo;* and that therefore there is involved a question of the validity of a statute.

The motion and brief of appellees and cross-appellants

cite and rely upon *People* v. *Chicago, Burlington and Quincy Railroad Co.*, 247 Ill. 340, 345; *People* v. *Chicago and Alton Railroad Company*, 247 *id.* 373; *People* v. *Illinois Central Railroad Co.*, 298 *id.* 516, 521; *Town of Lyons* v. *Cooledge*, 89 *id.* 529; *Worley* v. *Idleman*, 285 *id.* 214, 221; and the note following the case of *Lee* v. *Independent School District* (149 Iowa, 345) as reported in 37 L. R. A. (N. S.) 383. In *People* v. *Chicago, Burlington and Quincy Railroad Co., supra*, at page 345 it is held:

> "Where a right is asserted against a municipality and a judgment is recovered it is binding on tax-payers although they are required, as individuals, to pay the judgment, but a decree enjoining the collection of a tax to pay a demand against a town in a suit by tax-payers against the town is not *res judicata* against the holder of the demand who is not a party to the suit. (*Town of Lyons* v. *Cooledge*, 89 Ill. 529.) The interest of the holder of the demand is adverse to that of the town and the taxpayers, and he is not represented by either in a litigation between them. This case does not come within any recognized rule of representation of one not a party to the record."

In the recent case of *Alward* v. *Borah*, 381 Ill. 134 of the court quoted from the early case of *Botsford* v. *O'Connor*, 57 Ill. 72 at page 76 where it is said: "It is a principle that lies at the foundation of all jurisprudence in civilized countries, that a person must have an opportunity of being heard before a court can deprive such person of his rights. To proceed upon any other rule, would shock the sense of justice entertained by mankind, would work great wrong and injustices, and render the administration of justice a mere form. Until a person is made a party to a suit, and is afforded a reasonable opportunity of being heard in defense of his rights, a court has no power to divest him of his vested right." This rule has been reaffirmed

many times. *Leininger* v. *Reichle*, 317 Ill. 625; *Heppe* v. *Szczepanski*, 209 *id.* 88.

Cross-appellants insist that since the *Orvis* cases are not binding on the bondholders, the validating act of 1935 must, for the purposes of this suit, be presumed to be valid. In our opinion the record discloses that the question of the validity of the validating act of 1935, so far as the bondholders are concerned, was definitely raised and in issue in the trial court, and ruled upon by the trial court, and is also raised by the notice of cross-appeal and the brief of cross-appellants. This is sufficient to confer jurisdiction upon the Supreme Court on direct appeal. *Hackner* v. *VanWyck*, 381 Ill. 622.

It also appears from the record that none of the bondholders was a party to either of the *Orvis* cases. Under the cases cited the bondholders are entitled to their day in court on this question. The motion to transfer is allowed, and the cause is transferred to the Supreme Court.

Cause transferred.

APPENDIX B.

Decision of the Supreme Court of Illinois.

Docket No. 27330—Agenda 53—September, 1943.

The Ohio National Life Insurance Company *et al.*, Appellees, v. The Board of Education of Grant Community High School District No. 124, Appellant.

Mr. Justice Murphy delivered the opinion of the court:

This is an appeal from the judgments entered in the circuit court of Lake County. The legal questions submitted arise out of the facts surrounding the issuance of fifty-four bonds of $1000 each by the Board of Education of Grant Community High School District No. 124 of that county. It is the same issue of bonds, the validity of which was considered in connection with certain validating acts in *People ex rel Morse* v. *Orvis*, 358 Ill. 408 and *People ex rel. Leaf* v. *Orvis*, 374 Ill. 536. The questions in those cases arose on a taxpayer's objection to the taxes which had been levied to pay interest on the bonds in question. The Ohio National Life Insurance Company held thirty-three of these bonds and started this suit May 8, 1941. Pleadings filed by the board of education brought Leslie C. Small and May Small Inglesh, who collectively held fifteen bonds and Unity of Bohemian Ladies, who held six, into the action as parties defendants to its counterclaim. After a trial before the court without a jury, judgments were entered in favor of the holders proportionate to their respective interests in the bonds. The board appealed to the Appellate Court. On the

motion of a part of the bondholders, the cause was transferred to this court on grounds that a constitutional question was involved. The jurisdictional fact arises out of the bondholders's claim that they were not parties to the tax objection suits (the two *Orvis* cases) and that the holdings of this court in the last of those cases, that the act of 1935 was invalid, is not conclusive against them. The board of education contends that under the doctrine of *res judicata* the holding in the tax objection suit that the act of 1935 was invalid, and that the bonds in question are void, is conclusive against the bondholders in this case.

The conclusion has been reached that by the application of well-established principles, the opinions filed in the two *Orvis* cases are not *res judicata* as to the holders of the bonds and that, therefore, the validity of the 1935 validating act will have to be reconsidered in the light of the claims of the new parties, the new facts presented and the argument advanced in support thereof.

It was stipulated that the parties waived the necessity of formal pleadings but the bondholders' theory of their right of recovery will be better understood if a brief outline of the six counts of the complaint is set forth. The factual background as pleaded in the first count, and incorporated into some of the others by reference, shows that on February 16, 1931, the board of education adopted a resolution authorizing the execution and sale of fifty-five bonds of $1000 each and made provision therein for annual levies sufficient in amount to meet the semi-annual interest payments and the principal of the bonds as they matured. The interest was payable March 1 and September 1 of each year. Four of the bonds were to mature September 1, 1941, and five September 1 each year thereafter, to and including September 1, 1952. When this suit

was filed, all interest which had become due on and prior to September 1, 1939, had been paid.

The first count sought a recovery of the interest becoming due in 1940 and 1941. It was alleged that, pursuant to the resolution authorizing the issuance of the bonds, taxes had been extended annually and that there was sufficient money in the hands of the school treasurer to pay the interest becoming due in 1940 and 1941. The prayer was that a writ of *mandamus* issue commanding the school officials to pay such interest from the money so collected. The second count differed from the first in the relief asked, in that it alleged that prior to the suit the school officials had repudiated liability on the bonds, and that the county clerk would not extend taxes pursuant to the resolution adopted February 16, 1931. They prayed for a writ of *mandamus* to compel the county clerk to extend the tax in accordance with said resolution. The third count was premised on substantially the same facts as the first and alleged that the school officials had refused to make further payments of interest or principal on the bonds and were threatening to use the money collected for other purposes. The prayer was for an injunction to enjoin such misappropriation of the moneys collected. In the fourth count it was alleged that the board of education had repudiated liability for interest becoming due in 1940 and 1941 and disaffirmed the liability for principal on the bonds maturing September 1, 1941, and that, therefore, all other bonds had become due and payable at once, notwithstanding the date of later maturities as contained in the bonds. The prayer was for a money judgment. The fifth was for money had and received and the sixth for equitable subrogation. It was predicated on an alternative, namely: if the bonds were held invalid then the holders of the same should be subrogated to the rights of the creditors of the

defendants whose claims had been paid from the proceeds of the bonds.

The board of education filed an answer and counterclaim. The board asked for a recovery of the money paid to the bondholders as interest during the year 1931-1939, inclusive. It was further alleged that the annual levies had produced more than was necessary to meet the annual payments of interest and that these balances for the several years 1931-1939, and the amounts levied for the years 1940 and 1941 to include interest and principal, the aggregate of which was about $12,000, were in the treasury of the school district and that the Life Insurance Company was making demands, which if allowed, would give it priority over the Smalls and the Unity of Bohemian Ladies, and therefore, asked that there be an adjudication as to the disposition of such fund.

By the judgments appealed from the court held the bonds void and dismissed counts 1, 2 and 3 of the complaint but found that the bondholders were entitled to recover and entered judgments as follows: The Ohio National Life Insurance Company, $32,422.50, the Small interests collectively, $14,737.50 and Unity of Bohemian Ladies, $5895. The counterclaim was dismissed. The theory adopted by the trial court was that the school district was liable for money had and received, or as equitable subrogees for the amounts represented by the bonds held by the respective holders thereof. The bonds provided for interest at 5½ per cent per annum, but the bonds being void, the court fixed the interest at 5 per cent and after allowing credit for interest previously paid on the higher rate as fixed by the bonds, the judgments were entered for the amounts stated.

The Ohio National Life Insurance Company and the Smalls will be referred to as plaintiffs. The Unity of Bohemian Ladies have not followed this appeal. The board of education will be designated as defendant.

Defendant seeks to invoke the doctrine of *res judicata* against plaintiffs' claim by applying the principles announced in *People* v. *Orvis*, 374 Ill. 536. The conclusions reached in that case, which defendant now seeks to assert against plaintiffs, were that the validating act of June 6, 1935, was unconstitutional and that the bonds which are in question were illegal and did not furnish a proper basis for a tax levy. The principle that underlies the doctrine of *res judicata* is, that the court will not relitigate a matter which has been previously determined in an action between the same parties. It is a fundamental principle of law that controls the application of said rule that one is not bound by a prior judgment if he was not a party to such action or does not stand in the relation of privy to one who was a party.

Plaintiffs were not parties to either of the *Orvis* cases and the interests represented in those cases by the county collector and the taxpayer were not such as to support the principle that representation of one of a class is sufficient to bind all members of the class. The objecting taxpayer, whose property was assessed to raise money to pay plaintiffs' bonds had an interest decidedly adverse to plaintiffs and the county collector was but an agency named by law to collect the tax. Nor can it be said that plaintiffs were in privity to the county collector. In *People ex rel. Graff* v. *Chicago, Burlington and Quincy Railroad Co.*, 247 Ill. 340, in discussing a similar question it was said: "Where a right is asserted against a municipality and a judgment is recovered it is binding on taxpayers although they are

required, as individuals, to pay the judgment, but a decree enjoining the collection of a tax to pay a demand against a town in a suit by taxpayers against the town is not *res judicata* against the holder of the demand who is not a party to the suit. * * * The interest of the holder of the demand is adverse to that of the town and the taxpayers, and he is not represented by either in a litigation between them." Also see *Worley* v. *Idleman,* 285 Ill. 214, and *Town of Lyons* v. *Cooledge,* 89 Ill. 529. The principles announced in the last of the *Orvis* cases can not be invoked against the plaintiffs by application of the doctrine of *res judicata.*

There is another state of facts by which plaintiffs seek to reverse the application of the rule of *res judicata* and make a judgment of the Federal district court binding on defendant. In June, 1936, the insurance company obtained a judgment in the Federal district court against defendant for $3025. It represented the interest on bonds owned by the plaintiff which had matured prior to that date and remained unpaid. Defendant filed an answer. The issues, as raised by the pleadings, show that the insurance company relied upon the validating act of June, 1935, in support of its claim that there was interest due on its bonds. But from the pleadings of that case, appearing as evidence in this action, it does not appear that any question was raised as to the validity, construction or application of said validating act. The judgment entered permitted a recovery upon the assumption that the act was valid. As pointed out in the opinion in the later *Orvis* case, the Federal court was not the forum where the constitutionality of the validating act could be finally determined. It was held that the final determination of such questions was for the State courts and we now adhere to the holding in that case.

In applying the doctrine of estoppel by judgment, the distinction has been made between the finality of a judgment as a bar or estoppel where the second demand is for the same cause of action and between the same parties or their privies as the former action and those cases where the second action is between the same parties but upon a different claim or cause of action. If the action is of the former class, the judgment operates as an estoppel, not only as to every matter actually litigated in such action but extends to all grounds of recovery or defense which might have been presented. (*Harding Co.* v. *Harding*, 352 Ill. 417; *Markley* v. *People ex rel. Kochersperger*, 171 Ill. 260.) If the action between the same parties is of the latter class, that is, upon a claim or demand different from the one litigated in the first action, then the parties are estopped only as to those matters in issue or points controverted in the former action and the determination of which formed the basis of the judgment. (*Harding Co.* v. *Harding*, 352 Ill. 417.) In the action in the Federal court, the validity of the bonds or the validating act was not made an issue. The sole question was as to the liability of interest for the period in question and this liability was adjudicated upon the assumption that the validating act was valid. Under the circumstances shown, the judgment of the Federal district court is not *res judicata* against defendant's contention that the bonds are illegal. It would be binding only as to the amount of interest which defendant paid by satisfying the judgment in full. In defendant's counterclaim it seeks recovery for all interest paid, but as to the amount of the Federal district court judgment for $3025, that is final and conclusive against defendant and will be so treated in considering defendant's counterclaim on that matter.

The facts are not in dispute. In December, 1929, a spe-

cial election was held in the district which authorized the purchase of a building site, the construction of a school building and the issuance of bonds to the amount of $72,000. No question is raised as to the validity of the election and this issue of bonds is not involved. The bonds were sold, a site purchased, and a contract let for building and equipment.

On February 16, 1931, defendant adopted a resolution authorizing issuance of the bonds in question. It was stated in the resolution that the district had, outstanding and unpaid, binding and subsisting legal obligations and no funds for the payment of the same and for the purpose of funding said indebtedness the bonds were authorized to issue. The bonds were dated March 1, and were sold to H. C. Speers and Sons Company, May 14. The whole proceeding was carried through without calling an election and after the bonds were sold the proceeds were used to pay fifty claims aggregating $54,000.

It is agreed that of said total $27,253.63 was contracted for building purposes and $25,790.05 for educational purposes. The parties are agreed as to the classification of claims as between building and educational purposes, except as to eight totaling $5144.79. Of the total of the sum of $27,253.63, there was $8914.51 of that amount contracted before the statutory limit had been exceeded. One of the eight claims in dispute as to classification was for the payment of a special assessment lien against defendant's property. This was incurred February 3, 1930, before the statutory limit for indebtedness had been exceeded. Proceeds of the bonds were used in its payment to the village of Fox Lake in the amount of $1787. This was properly chargeable to the building fund, and having been contracted prior to the time when the statutory debt limit had been exceeded, it should be added to the other total

of $8914.51, thus making a total of $10,701.51. The other seven claims appear to have been incurred after the debt limit had been exceeded and, under the views hereinafter expressed, it would be of no consequence whether they be classified under the educational or building fund. For the purpose of carrying the total, they will be classified as building-fund claims. This computation leaves $16,552.12 of claims contracted after the debt limit had been exhausted. It was agreed that the item of $25,790.05, chargeable to the educational fund, was within the annual educational tax levy when incurred.

The total assessed valuation of all taxable property in the district for 1930, which was the valuation that controlled when the bonds were issued, was $3,206,252. During the years 1929 and 1930, there had been the regular levy for building and educational purposes. A summary of the building-fund account shows the total cost of the building was $142,618.74. Of this amount $115,305.11 had been paid on the day the bonds in question were sold. The money for such payment was derived from the sale of the first bond issue, $72,000, and the annual levies for 1929 and 1930 for building and educational purposes. There remained unpaid on said date the sum of $10,701.51, which, as previously stated, was incurred before the debt limit had been exceeded, $16,552.12 contracted thereafter, plus the amount necessary to replenish the educational fund, $25,790.05.

It is agreed that the total credit available for building purposes, had statutory limits been observed and the annual tax levies applied, would have been $97,170.41, thus making the cost of the building exceed the available credits in the sum of $45,448.33.

The details of the receipts, expenditures for building purposes and the amounts drawn from the educational fund and used for building purposes did not appear in the record of either of the *Orvis* cases. In the first *Orvis* case, it was said that it was virtually conceded that all the claims totaling $54,000 were incurred for building purposes at a time when the statutory limit had been exceeded. This is the principal difference in the facts between the record presented in the last *Orvis* case and the present case.

Section 195 of the School Law (Ill. Rev. Stat. 1943, chap. 122, par. 218) authorizes a board to borrow money and issue bonds to build a schoolhouse or repair one, provided the proposition has been first submitted to the voters of the district and has received a majority of all the votes cast on such proposition. As has been stated, the defendant made no attempt to comply with such requirement. In the first *Orvis* case, it was contended that the act of April 30, 1931, (Cahill's Rev. Stat. 1933, chap. 122, par. 446(10),) obviated the necessity of such an election. It was held that the act did not either expressly or by implication purport to authorize an issue of bonds without a vote of the people. Reference to the title of the act and the language used clearly shows that no other conclusion could have been drawn from it.

In the first *Orvis* case, it was also held that the act of April 30, 1931, did not authorize a board of education to increase the indebtedness of the district beyond the statutory limit of 2½ per cent and then to proceed to provide means for its payment either by tax levy or a bond issue. In this connection it was said: "Analyzing the terms of the 1931 act, it is readily perceived that the statute would apply where the board anticipated the need of funds for a lawful purpose and provided for a bond issue in advance

of incurring any debt beyond the statutory limit. It is equally manifest that the authority to issue bonds in excess of the 2½% limit 'for any purpose now authorized by law' does not authorize the issue of bonds to pay claims in excess of the statutory limit. Their payment was not a purpose authorized by law." No reason is advanced which warrants a departure from the construction of said act as given in this case and followed in the second *Orvis* case.

We need only to apply such construction of the act to the facts in this case which, as has been pointed out, differ in some material respects from the facts in the prior cases. It was conceded in the tax-objection cases that the whole of the $54,000 of debt was incurred after the statutory debt limit had been exceeded. Accordingly, it was held that the whole issue of bonds was in the same category and that, there being no legal indebtedness to support them, the bonds were illegal. In this case it was proved that $10,701.51 of the total claims were incurred before the debt limit had been reached. This raises questions not considered in the *Orvis* cases, the first of which is, may a bond issue, a part of which was within the statutory debt limit and a part without be divided and the part that was within the limit be held valid? No case has been cited where the statutory debt limit had been exceeded under the circumstances stated, but there are cases where the constitutional debt limit had been so exceeded. The similarity of the language used in the constitutional provision and the statute makes the holdings in those cases persuasive in this case. Section 12 of article IX of the constitution prohibits the municipalities therein named from becoming indebted "in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable

property" etc. Section 1, (Cahill's Rev. Stat. 1933, chap. 120, par. 362 (2),) as it applies to school districts such as this, prohibits districts from becoming "indebted in any manner or for any purpose to an amount including existing indebtedness in the aggregate exceeding two and one-half ($2\frac{1}{2}$) per centum on the value of the taxable property therein" etc.

In *Culbertson* v. *City of Fulton*, 127 Ill. 30, the constitutional limit was considered. The debt incurred was $11,619 while the constitutional limit was $10,453.05, thus the indebtedness exceeded the constitutional limit by $1165.95. It was said, "The indebtedness, however, can only be regarded as void to the extent of the amount of the excess over the constitutional limit. Up to and under that limit, the indebtedness is valid. The inhibition operates upon the indebtedness and not upon the form of the debt." Also see *Mix* v. *People ex rel. Pierpont*, 72 Ill. 241, *Baltimore and Ohio Southwestern Railroad Co.* v. *People ex rel. Gaston*, 200 Ill. 541, and *McPherson* v. *Foster*, 43 Iowa, 48, 22 Am. Rep. 215. Construing the statute in the light of these decisions, the bonds in question to the amount of $10,701.51 were valid if failure to observe the statutory requirement, that authorization must come from an affirmative vote of the people of the district, has been validated by the curative acts hereinafter considered.

The claims totaling $25,790.05, paid from the educational fund, thereby leaving unpaid claims of that fund to be satisfied out of the proceeds of the bond issue, also require separate consideration. It appears that debts in said amount were contracted for building purposes but paid from the educational fund. When the total of unpaid claims against the district was computed preparatory to adopting the resolution of February 16, 1931, there were

included in such total, claims aggregating $25,790.05. It is conceded these claims were properly payable from the educational fund and should have been paid from that fund had it not been for the earlier diversion of a part of the fund to the payment of claims for building purposes. To present the full factual background, it was stipulated that the claims for educational purposes were well within the annual tax levy for educational purposes. From the facts shown, it is evident the educational fund was operating on a cash basis and, had it not been for the misappropriation, there would have been sufficient money available in the educational fund to pay the claims in the sum of $25,790.05. Under such circumstances, the stipulation as to the annual levy for educational purposes is immaterial. The status of the statutory limit when the original claims were contracted for building purposes is the factor that controls here, and in determining whether the said sum of $25,790.05 was incurred within or without the statutory debt limit, reference must be made to the status of the statutory debt limit when these debts for building purposes were incurred. The evidence shows that on March 18, 1930, the debt limit for building purposes had been exceeded and three claims aggregating $29,521 were beyond the statutory limit for incurring indebtedness for building purposes. During the interim between March 18, 1930, and the adoption of the resolution of February 16, 1931, one of the three claims was paid in full but there remained unpaid on the other two a total of $4010. From these facts it appears obvious that the indebtedness of the district was in excess of the statutory limit for at least one year prior to the adoption of the resolution. The date on which the claims for building purposes were incurred, which claims were later paid from the educational fund, is not shown, but since the general contract for the building was not awarded

until March 10, 1930, it would appear that the building purpose claims were contracted following March 18, 1930, and at a time when the statutory debt limit had been exceeded. Such claims were therefore invalid and the bonds issued to repay the educational fund were, under the circumstances shown, also invalid. The further claims incurred for building purposes, totaling $16,552.12, incurred after the debt limit had been exceeded, were invalid.

On May 1, 1933, the General Assembly passed a so-called validating act. (Cahill's Rev. Stat. 1933, chap. 122, par. 446(13).) The pertinent parts of section 1 are, that "in all cases where the governing body of any school district heretofore shall have issued bonds for the purpose of refunding maturing principal or interest, or both, of its bonds which were valid and legal obligations of said district or has issued bonds for the purpose of funding and paying orders issued for the wages of teachers, * * * with or without an election, and the bonds and interest coupons so refunded or the teachers' orders or legal claims so funded, have been paid and canceled, each such refunding or funding bond issue is hereby validated and recognized as a valid and binding obligation of the school district issuing the same." This section was also considered in the first *Orvis* case and it was there held that the phrase "for the purpose of funding and paying * * * legal claims" limited the application of the section of the statute to legal and valid claims and that inasmuch as the total indebtedness for which the proceeds of the bonds were to be used had been incurred in excess of the statutory limit, the bonds were illegal and the statute could not be applied. Again noting the distinction between the facts presented in that case and the instant case, it follows that the claims aggregating $10,701.51 for building purposes, which were incurred before the debt limit had been exhausted, were

validated by the validating act of May, 1933. Under principles announced in *People* v. *Orvis,* 374 Ill. 536, it was within the power of the General Assembly to cure the defect arising out of the failure to call an election authorizing the issuance of the bonds.

After the opinion in the first *Orvis* case was filed, the General Assembly passed the so-called validating act of June 6, 1935. (Ill. Rev. Stat. 1937, chap. 122, par. 406y.) In the second *Orvis* case it was considered and held unconstitutional. Plaintiffs ask for a reconsideration of that case on the question of the constitutionality of said act and to now hold it constitutional. It directed that "Whenever any person, firm, or corporation shall have rendered service or furnished materials to any school district for the corporate purposes of the district and such services or materials shall have been paid for by or out of the proceeds of bonds issued by such school district with or without an election, and the amount of the claims for such services or materials, together with other indebtedness, exceeded in whole or in part two and one-half per cent (2½%) of the assessed value of taxable property of the district at the time such services were rendered or materials furnished, the issuance of such bonds shall be deemed a validation of such claims insofar as said claims, together with other indebtedness, did not exceed five per cent (5%) of such valuation at the time they were incurred and at the time such bonds were issued." It will be observed that the part of the statute quoted did not undertake to correct errors occurring in the procedure under which the bonds were issued. Its purpose was to deal with claims which were to be paid from the proceeds of the bonds, and which had been held invalid in the first *Orvis* case, and the act of June 6, 1935, undertook to make them legal obligations of the district. In other words, it under-

took to make valid those claims incurred in excess of the statutory limit so that they would furnish a basis of liability against the district and thus support the issuance of the bonds. The act was not, as is contended by plaintiffs, one dealing solely with the statutory debt limitation. It directs that where service or material has been furnished a school district and the same has been paid from the proceeds of bonds issued by the district, such payment shall be deemed a validation of the claims notwithstanding they were incurred in violation of the statutory debt limit. Section 10 of article IX of the constitution prohibits the General Assembly from imposing taxes upon municipal corporations and the provisions of the Act of June 6, 1935, have that effect when applied to the facts of this case. It is the imposition of a taxable liability upon the property in the district to pay claims which were otherwise invalid. We reaffirm the reasoning of the opinion of the second *Orvis* case and adhere to the conclusion there announced that the so-called validating act of June 6, 1935, is unconstitutional.

As alternative relief, plaintiff contends that if the bonds were invalid they have a right to recover the amount paid for the bonds in an action of assumpsit for money had and received. The specific question is as to whether or not the circumstances under which the bonds were issued and sold are sufficient to raise an implied contract on the part of the defendant to repay the money which it obtained through the sale of the bonds. This contention calls for application of the distinction between an irregular exercise of power and a step taken where there is an entire absence of such power. In 38 American Jurisprudence, page 196, it is said: "If a municipal corporation is without power to enter into an express contract in relation to a particular subject, it is equally without power to bind it-

self upon implied contract as to the same subject by any act of its officers, agents, or employees. Hence the corporation ordinarily can not be held upon an implied contract to pay the reasonable value of property received or services rendered under an express contract which was beyond the scope of its powers to enter into."

The validity of the bonds in question rests upon the validity of the claims which were paid from the proceeds of the sale of the bonds. The defendant was authorized by a vote of the people of the district to build a schoolhouse. The proposition as submitted at the election contained no restrictions as to the amount but the power arising out of such authorization was not unlimited. The statute which prohibited the district from becoming indebted in any manner or for any purpose in excess of 2½ per cent of the assessed valuation was a restriction upon the power of the board to act. When indebtedness was incurred in excess of that limit it was, as to such excess, an act without power to sustain it. Had there been a failure to observe and follow some of the provisions of the statute as to contracting indebtedness and issuing bonds within the limit, that would have been an irregular exercise of the power, but when the defendant elected to go directly into the face of the statute and incur indebtedness in amounts prohibited by it, it was acting without power. Under such circumstances, the law will not supply the fiction of a promise to repay the money it has so received.

The statutory limitation of indebtedness was enacted in the interests of the taxpayers residing within the boundaries of the various municipalities. They were entitled to the protection of all constitutional and statutory restrictions as to limits of indebtedness. If the officers of a municipality may contract debts in excess of the statutory

limit, borrow money to pay it and then become liable in an action for money had and received, the very purpose for which the statute was enacted has been defeated. One dealing with a municipal corporation is chargeable with notice of its powers and limitations and if he purchases bonds the proceeds of which are to be applied to a purpose prohibited by statute, he cannot, when the bonds have been declared illegal, sustain an action for money had and received. For cases concerning liability of municipalities for money received by them for unlawfully issued instruments of indebtedness and the distinction made, see annotation in 7 A. L. R. 353.

Plaintiffs contend that the doctrine of equitable subrogation should be applied as to certain claims which were paid by the proceeds from the sale of the bonds. The evidence shows that the bonds were sold and delivered May 14, 1931, to H. C. Speer & Sons Company, dealers in municipal bonds. They were to bear interest at 5½ per cent per annum and were sold by defendant to Speer & Sons at par plus accrued interest. Within a few days thereafter, Speer & Sons resold the bonds on the basis of about 4½ per cent, thus yielding a profit to the original purchasers.

It is well settled that a mere stranger or volunteer cannot, by paying a debt for which another is bound, be subrogated to the creditor's rights in respect to the security given by the real debtor. But if the person who pays the debt is compelled to pay for the protection of his own interest and rights, then the substitution should be made. (*Bennett* v. *Chandler,* 199 Ill. 97; *Hough* v. *Aetna Life Ins. Co.* 57 Ill. 318.) In the *Chandler case* it was said that "a stranger within the meaning of this rule is not necessarily one, who has had nothing to do with the transaction out of which the debt grew. Anyone, who is under

no legal obligation or liability to pay the debt, is a stranger, and, if he pays the debt, a mere volunteer." Under the principles announced in the foregoing cases it is obvious that plaintiffs are not entitled to be subrogated to the rights of the various creditors whose claims were paid from the proceeds of the sale of the bonds.

The defendant included in the total for which bonds were issued two claims of the Fox Lake State Bank aggregating $956.32. After the bonds were sold these two claims were paid from the proceeds. Thereafter it was determined that no such claims existed and the bank repaid the money to the defendant. Defendant alleges in its counterclaim that this balance is in the hands of the school treasurer and is included in the total of $12,000 for which it asks directions as to disbursement. The proceeds of the bonds are directly traceable to this sum and, by application of well-established principles of equity, the sum belongs to plaintiffs. It was paid to the defendant for bonds on a mistake of fact and it should be repaid to plaintiffs.

Defendant asked for a refund of the amount of interest it paid plaintiffs from 1931 to and including September 1, 1939. As previously noted, $3025 of the interest was paid in settlement of the judgment taken in the Federal court and as to the payment of that money, that judgment would be conclusive against the defendant. As to the other items of interest, there is no evidence that the defendant paid any of them by mistake of fact or through fraudulent representations. Under such circumstances, the money will be deemed to have been voluntarily paid and there is no right of recovery. In *Village of Morgan Park* v. *Knopf,* 199 Ill. 444, it was held that the rule that money paid under mistake of law, there being no fraud or mistake of fact, cannot be recovered back applies to municipal corporations

as well as to individuals. See, also, *People* v. *Foster,* 133 Ill. 496.

As a result of these conclusions, bonds to the amount of $10,701.51 are valid, binding obligations of the district and subject to the payments of interest and maturities as stated in the bonds. The fifty-four bonds held by the plaintiffs and the Unity of Bohemian Ladies should be reduced proportionately to said amount. The plaintiffs and the Unity of Bohemian Ladies should be reimbursed for the $956.32, which should be paid proportionately to their respective interests. All other relief asked by plaintiff should be denied. The amounts collected by bond tax levies and remaining in the treasury should be applied proportionately on the bonds found to be valid and interest thereon.

For the reasons assigned, the judgments of the circuit court are reversed and the cause remanded, with directions to proceed in accordance with the views herein expressed.

Reversed and remanded, with directions.

APPENDIX C.

United States Revised Statutes, Section 905, 28 U. S. C. A., Sec. 687:

> "The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a

seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

APPENDIX D.

Judgment of the United States District Court for the Northern District of Illinois, Eastern Division in the case entitled: *Ohio National Life Insurance Co.* v. *Board of Education of Grant Community High School District Number* 124, County of Lake and State of Illinois. Rendered June 30, 1936.

"This cause being called for trial and issues being joined and the Court having heard the evidence adduced finds the issues for the Plaintiff and assesses the Plaintiff's Damages at the sum of Three Thousand and Twenty-Five and No/100 Dollars ($3,025.00). Therefore It Is Considered by the Court that the Plaintiff, The Ohio National Life Insurance Company, do have and recover of and from the Defendant, Board of Education of Grant Community High School, etc. its said damages of Three Thousand Twenty-Five Dollars ($3,025.00), together with its costs and charges in this behalf expended and have execution therefor.

"On motion of Plaintiff's attorneys It is Ordered that leave be and the same is hereby given to withdraw coupons upon filing photostatic copies of same."

APPENDIX E.

Illinois Revised Statutes, 1937, Chap. 122, Par. 406y:

"Bonds to pay for services or materials validated. Whenever any person, firm or corporation shall have rendered services or furnished materials to any school district for the corporate purposes of the district and such services or materials shall have been paid for by or out of the proceeds of bonds issued by such school district with or without an election, and the amount of the claims for such services or materials, together with other indebtedness, exceeded in whole or in part two and one-half per cent (2 ½%) of the assessed value of taxable property of the district at the time such services were rendered or materials furnished, the issuance of such bonds shall be deemed a validation of such claims insofar as said claim, together with other indebtedness, did not exceed five per cent (5%) of such value at the time they were incurred and at the time such bonds were issued. All proceedings had in connection with the issuance of such bonds are hereby validated and such bonds insofar as the same or the proceeds thereof were used to pay such validated claims are hereby declared to be valid and legally binding obligations of the district."

APPENDIX F.

Sec. 237(b) Judicial Code, 28 U. S. C. A., 344(b):

It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ

of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

(16)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 717

THE OHIO NATIONAL LIFE INSURANCE COMPANY, A CORPORATION, LESLIE C. SMALL AND MAY SMALL INGLESH,

Petitioners,

vs.

BOARD OF EDUCATION OF GRANT COMMUNITY HIGH SCHOOL DISTRICT NO. 124 OF LAKE COUNTY, ILLINOIS; ARTHUR H. FRANZEN, AS TREASURER OF GRANT COMMUNITY HIGH SCHOOL DISTRICT NO. 124 OF LAKE COUNTY, ILLINOIS; ARTHUR G. HIGHGATE, LADDIE RASKA, WILLIAM G. NAGLE, WILLIAM TONYAN AND CHARLES BRAINARD, AS MEMBERS OF THE BOARD OF EDUCATION OF GRANT COMMUNITY HIGH SCHOOL DISTRICT NO. 124 OF LAKE COUNTY, ILLINOIS; AND JAY B. MORSE, AS COUNTY CLERK OF LAKE COUNTY, ILLINOIS,

Respondents.

ANSWER OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ROYAL W. IRWIN,
Attorney for Respondents.

BENJAMIN F. LANGWORTHY,
Of Counsel.

THE BLAKEMORE-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

SUBJECT INDEX.

Summary of Argument.

I.

The judgment of the United States District Court did not adjudicate the validity of the bonds or coupons sued on in this case by the Ohio National Life Insurance Company. That suit was on other and prior maturing coupons. It had a wholly different subject matter. The factual basis for the claims of petitioners do not appear in this record. No where in the record of that case is it claimed the plaintiff was the owner of any bond 14-17

II.

No reviewable Federal question was presented to the Illinois courts by petitioners Small and Inglesh. They have never been parties to any case prior to this case so far as this record discloses. They are not privies of Ohio National Life Insurance Company 18

III.

The judgment and opinion of the Illinois court accords the same effect to the Federal court judgment it accords judgments of its courts of equal authority. This is the extent of petitioners' rights. Since the judgment and opinion of the state court applies the same rules it applies when state judgments are pleaded and proven under similar circumstances the petition must be denied 19

IV.

State law controls decisions on both substantive and procedural rights unless an estoppel intervenes... 20, 21

V.

TABLE OF CASES CITED.

STATUTES CITED.

TEXTBOOKS CITED.

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Respondents.

ANSWER OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

The respondents respectfully show, in answer to the petition for writ of certiorari, as follows:

I.

Corrections in Petitioners' Summary Statement.

The suit in the United States District Court was based on certain coupons (R. 105, 106). The answer in that suit raised no issue on the validity of the bonds or the validating act. The only issue was the right to recover on the interest coupons sued on (R. 106, 107).

The Circuit Court of Lake County did not ignore the judgment of the District Court. It did deny recovery by the Board of Education on its counterclaim the amount of interest paid on the bonds to Ohio National Life Insurance Company including the amount recovered in the District Court.

The Supreme Court of Illinois did recognize the District Court judgment and held it *res judicata* on the right of the Board of Education to recover the interest paid to the Ohio National Life Insurance Company to the extent of the interest that was the subject matter of that suit (R. 173).

The quotation from the opinion of the Supreme Court of Illinois in the petition is by way of reference to the second Orvis opinion. It is the following paragraph of the opinion of the Supreme Court of Illinois (R. 163, 164) where that court recognizes the District Court judgment and gives effect accordingly. It is there stated:

> "In the action in the Federal court, the validity of the bonds or the validating act was not made an issue. The sole question was as to the liability for interest for the period in question and this liability was adjudicated upon the assumption that the validating act was valid. Under the circumstances shown, the judgment of the Federal district court is not *res judicata* against the defendant's contention that the bonds are illegal. It would be binding only as to the amount of interest

which defendant paid by satisfying the judgment in full. In defendant's counterclaim it seeks recovery for all interest paid, but as to the amount of the Federal district court judgment for $3,025, that is final and conclusive against defendant and will be so treated in considering defendant's counterclaim on that matter."

Some Additional Facts Appearing in This Record.

The Unity of Bohemian Ladies are the owners of the first six $1,000 bonds of the 54 issued. Leslie C. Small and May Small Inglesh are the owners of the next 15 bonds, and the Ohio National Life Insurance Company are the owners of the remaining 33 bonds. All three were defendants to the counterclaim of the Board of Education in this case. The Unity of Bohemian Ladies are not petitioners here. The Ohio National Life Insurance Company was the sole plaintiff in the Federal district court case. That suit was on separate coupons. Was not on any bonds. No where in the record of the District Court proceeding is it claimed or alleged that the Ohio National Life Insurance Company, plaintiff was then the owner of any of the bonds.

It appears the Board of Education had constructed its building at a cost of $45,448.33 in excess of its debt incurring power (R. 165). That the 54 bonds were issued in part to fund this cost. These bonds were issued on the invitation of H. C. Speer & Sons Company, the assignor of petitioners (R. 72, 73). They prepared the papers and furnished the legal opinion (R. 71, 73). The Ohio National Life Insurance Company acquired its 33 bonds from a company it purchased in April 1933, which acquired them shortly after they were issued (R. 69). The ancestor of petitioners, Small and Inglesh, purchased their 15 bonds in June 1931 from Arthur E. Inglesh, who, in turn, pur-

chased them from Gospell, Vieth and Duncan, bond brokers, and they, in turn, purchased the issue from the underwriter, which was Speer & Sons Company (R. 85, 86). There is no relation between petitioner, Ohio National Life Insurance Company, and petitioners Small and Inglesh. The last two petitioners never recovered any judgment against the Board of Education prior to the present suit and never brought an action against the Board of Education until they filed a counterclaim in this case.

It further appears the petitioners did not bring to this court for review the final judgment entered in the second Orvis case after the first petition for certiorari was "denied for want of a final judgment" (312 U. S. 705, 85 L. E. 1138).

II.

Basis on Which Petitioners Now Contend This Court Has Jurisdiction to Review the Decision of the Supreme Court of Illinois.

It may be conceded the right claimed by the petitioner, Ohio National Life Insurance Company in this case is a right claimed by authority exercised under the statute of the United States.

It is not believed the petitioners Small and Inglesh had or asserted any such right.

1. It is readily conceded the judgment of the Supreme Court of Illinois rendered May 16, 1944, is a final judgment in the sense that it gives specific directions to the Circuit Court of Lake County, Illinois, to enter a judgment in favor of the Ohio National Life Insurance Company for 33/54ths of $956.32 and for 19.818% of its claim on its 33 bonds and unpaid coupons against the Board of Education, and to find and adjudge 80.182% of its 33 bonds and unpaid

coupons null and void and to enter a similar judgment in favor of Leslie C. Small and May Small Inglesh for 15/54ths of $956.32 and for 19.818% of their claim on their 15 bonds and unpaid coupons against said board of education and to find and adjudge 80.182% of the said 15 bonds and unpaid coupons null and void, and also to enter a like judgment in favor of and against the Unity of Bohemian Ladies. The Circuit Court of Lake County is bound by the law to enter the judgment just as directed by the Illinois Supreme Court. So was the County Court of Lake County, Illinois, in the second Orvis case. *People* v. *Orvis*, 374 Ill. 536, 30 N. E. (2) 28. Nevertheless, this court on petition for certiorari in that case denied the writ for want of a final judgment (312 U. S. 705, 85 L. E. 1138).

2. The judgment of the United States District Court in the case of Ohio National Life Insurance Company against the Board of Education rendered June 30, 1936, did not purport to hold the bonds in question valid and did not in fact do so (R. 163, 164). That suit was on certain coupons and was not on any bond (R. 194 to 108). The only issue raised was the right to recover on those coupons. That judgment was pleaded by the Ohio National Life Insurance Company and by it was asserted to be "*res judicata* of all issues involving the validity of said bonds or between plaintiff and said district" (R. 4).

3. There is no basis of fact for the petitioners, Leslie C. Small and May Small Inglesh, to aver the judgment of the District Court held the bonds valid. They were not parties to that case. Their bonds were not before that court. The judgment was for damages of $3,025 and the plaintiff was given leave to withdraw the coupons upon filing photostatic copies of same (R. 108). That judgment did not purport to hold and did not hold any bond valid or otherwise. There is no identity of interest of

Small and Inglesh and the Insurance Company, because they own different bonds of the issue. It is not claimed the coupons sued on by the Insurance Company were actually taken from the bonds of Len Small, who owned the 15 bonds until his death on May 25, 1936 (R. 86) as was the case in *Cromwell* v. *County of Sac.*, 94 U. S. 351.

It is not claimed the Insurance Company in its suit on its coupons also included any coupons of Len Small. There is no privity between the Insurance Company and Len Small shown by the record. To assert identity of interest does not show any interest of Len Small in the district court proceeding.

4. There was no judgment of the District Court holding bonds valid. The Supreme Court of Illinois expressly recognized the District Court judgment (R. 162, 163, 164), where it is said:

> "There is another state of facts by which plaintiffs seek to reverse the application of the rule of *res judicata* and make a judgment of the Federal district court binding on defendant. In June, 1936, the insurance company obtained a judgment in the Federal district court against defendant for $3025. It represented the interest on bonds owned by the plaintiff which had matured prior to that date and remained unpaid. Defendant filed an answer. The issues, as raised by the pleadings, show that the insurance company relied upon the validating act of June, 1935, in support of its claim that there was interest due on its bonds. But from the pleadings of that case, appearing as evidence in (fol. 39) this action, it does not appear that any question was raised as to the validity, construction or application of said validating act. The judgment entered permitted a recovery upon the assumption that the act was valid. As pointed out in the opinion in the later Orvis case, the Federal court was not the forum where the constitutionality of the validating act could be finally determined. It was

held that the final determination of such question was for the State courts and we now adhere to the holding in that case.

"In applying the doctrine of estoppel by judgment, the distinction has been made between the finality of a judgment as a bar or estoppel where the second demand is for the same cause of action and between the same parties or their privies as the former action and those cases where the second action is between the same parties but upon a different claim or cause of action. If the action is of the former class, the judgment operates as an estoppel, not only as to every matter actually litigated in such action but extends to all grounds of recovery or defense which might have been presented. (*Harding Co.* v. *Harding*, 352 Ill. 417; *Markley* v. *People ex rel. Kochersperker*, 171 Ill. 260.) If the action between the same parties is of the latter class, that is, upon a claim or demand different from the one litigated in the first action, then the parties are estopped only as to those matters in issue or points controverted in the former action and the determination of which formed the basis of the judgment. (*Harding Co.* v. *Harding*, 352 Ill. 417.) In the action in the Federal court, the validity of the bonds or the validating act was not made an issue. The sole question was as to the liability for interest for the period in question and this liability was adjudicated upon the assumption that the validating act was valid. Under the circumstances shown, the judgment of the Federal district court is not *res judicata* against defendant's contention that the bonds are illegal. It would be binding only as to the amount of interest which defendant paid by satisfying the judgment in full. In defendant's counterclaim it seeks recovery for all interest paid, but as to the amount of the Federal district court judgment for $3025, that is final and conclusive against defendant and will be so treated in considering defendant's counterclaim on that matter."

and (R. 173) where it is said:

"Defendant asked for a refund of the amount of interest it paid plaintiffs from 1931 to and including Sep-

tember 1, 1939. As previously noted, $3025 of the interest was paid in settlement of the judgment taken in the Federal court and as to the payment of that money, that judgment would be conclusive against the defendant."

5. The Supreme Court of Illinois did not fail to give full faith and credit to the said District Court judgment. This is demonstrated by the foregoing quotations from the opinion of said Supreme Court.

6. It is respectfully asserted that the Supreme Court of Illinois did recognize the judgment of the United States District Court rendered June 30, 1936, and that this case is not controlled by the cases cited by petitioners but by the cases cited in said opinion and by the case of *Cromwell* v. *County of Sac.*, 94 U. S. 351.

III.

The Question Presented.

1. The question as stated by petitioners assumes a number of facts that do not exist.

As to the petitioners Small and Inglesh, they had no judgment. There is no pretense they ever were a party to a former suit of any kind to which the board of education was a party.

As to the Ohio National Life Insurance Company, its suit was on another subject matter, viz.: certain interest coupons which were afterward paid. The interest coupons sued on in the District Court were not in the suit of the Ohio National Life Insurance Company in the Circuit Court of Lake County, Illinois, until the board of education attempted to bring them in, in its counterclaim for the purpose of recovering back the amounts paid as interest on void bonds. In that counterclaim it was shown the board

of education has collected certain taxes levied to pay interest on all of the 54 bonds and to pay principal of certain of said bonds, that the Ohio National Life Insurance Company was claiming the right to all of said fund, that if the bonds were legal, which was denied, the said Unity of Bohemian Ladies, Leslie C. Small and May Small Inglesh, had an interest in that fund and should be before the court and required to assert their rights or be barred (R. 31 to 37). It was in response to this counterclaim that Leslie C. Small, May Small Inglesh and Unity of Bohemian Ladies appeared and answered the counterclaim and in turn filed a counterclaim on their bonds and unpaid coupons. The Ohio National Life Insurance Company also filed its answer to the counterclaim of board of education (R. 19, 20). This suit of Ohio National Life Insurance Company is on the 33 bonds and unpaid coupons and is on a different subject matter from the said suit in the United States District Court. The judgment in the latter is not *res judicata* in the case.

It is not denied the District Court of the United States had jurisdiction of the parties and the subject matter. That subject matter, however, was and is a different subject matter from the subject matter of the present suit of the Ohio National Life Insurance Company. Leslie C. Small and May Small Inglesh are not parties to the District Court case and are not privies to the Ohio National Life Insurance Company. They did not set up the proceedings in the United States District Court case in their counterclaim against the Board of Education or make any claim in the Circuit Court of Lake County or in the Supreme Court of Illinois, prior to the filing of that court's opinion in this case, by virtue of the judgment and proceedings of said District Court (R. 44 to 48). Hence this Court is without jurisdiction of the petition of Leslie C. Small and May Small Inglesh.

Hence it follows that the real question presented is narrowed to the claim of the Ohio National Life Insurance Company that the Supreme Court of Illinois did not give to the United States District Court judgment the effect claimed for it by that company.

Concisely stated, the point is the Supreme Court of Illinois held the District Court judgment an estoppel only on the question decided in that case, viz.: the right to recover on the coupons declared on in that suit. That the validity of the bonds and Validating Act were not in issue and were not adjudicated by that judgment.

Respondents claim this is the factual state of the record and therefor this court is without jurisdiction of this petition of the Ohio National Life Insurance Company.

IV.

Petitioners' Reasons Relied Upon for Allowance of the Writ Are Not Adequate.

The Supreme Court of Illinois did recognize the validity and binding effect of the prior United States District Court judgment. That judgment did not deal with the bonds or coupons that matured after March 1, 1936. In its opinion the Illinois Court found this case is on a *different claim* or *cause of action* and the parties to the former suit are estopped only as to the matters in issue or points controverted in the former action and the determination of which formed the basis of the judgment. Since the validity of the bonds of the Ohio National Life Insurance Company and the validity of the 1935 Validating Act were not adjudicated by the District Court judgment, this court is without jurisdiction of this petition for certiorari.

In any event, the state court is required by the statute of the United States to give to the judgment of the Federal

court such effect and such effect only as it gives to judgments of the state court under similar circumstances. It appears the state court fully conformed to this requirement. It follows the Ohio National Life Insurance Company has no factual basis for its petition in this case.

Jurisdiction.

Respondents concede the decision of the Supreme Court of Illinois is final in the sense that the Circuit Court of Lake County is required by the law in Illinois to enter the decree directed in the opinion of the Supreme Court. Nevertheless, this court held in *People ex rel., Leaf, County Treasurer, etc.* v. *Orvis*, 312 U. S. 705, the petition in that case should be denied for want of a final judgment. The final judgment has not been entered by the Circuit Court of Lake County in this case. In the Orvis case the County Court had heard the evidence of the parties on the objections of Orvis and denied leave to file those objections on the ground of lack of meritorious defense. *The People* v. *Orvis*, 374 Ill. 536 at 537. That opinion states, at page 538:

> "Appellant contends here, that the County Court erred in finding that appellant had not sustained his objections."

And at page 545:

> "The judgment is reversed and the cause remanded to that court, for further proceedings not inconsistent with the views herein expressed."

When that case was redocketed in the County Court of Lake County, the record was before the court, the objections, the evidence of the parties, and the opinion and judgment of the Supreme Court and the only thing the County Court could do was to follow the directions in that opinion, sustain the objections and deny the application and judgment for the tax. That judgment was the final judgment.

It is suggested that it follows this court is without jurisdiction for want of a final judgment in this case.

It is further contended by respondents that there is no factual basis for the writ of certiorari, assuming the judgment and opinion of the Supreme Court of Illinois is final.

It appears the petitioners, Leslie C. Small and May Small Inglesh, had no judgment to rely on. They were not parties to the District Court judgment and are not privies of Ohio National Life Insurance Company. Therefore, this court is without jurisdiction of the petition of Small and Inglesh.

It further appears the Supreme Court of Illinois has given the same effect to the judgment in favor of the Ohio National Life Insurance Company against the Board of Education in the United States District Court that it gives to judgments of the state court under like circumstances. This is a complete compliance with the Federal statute. Therefore, this court is without jurisdiction of the petition of Ohio National Life Insurance Company.

Answer to Petitioners' Specifications of Assigned Errors.

1. Factually, the Supreme Court of Illinois did not disregard the prior judgment entered by the District Court of the United States for the Northern District of Illinois in a suit between the same parties and involving the same subject matter. The suit was between some of the same parties but the subject matter was wholly different. Also, the Supreme Court of Illinois did regard the prior judgment and give effect to it, in compliance with the Federal statute.

2. While the Supreme Court of Illinois did hold the bonds approximately 80% void, the question of the validity of those bonds is a state question on which the opinion of the Supreme Court of Illinois is final and controlling in this court under ordinary circumstances.

Said bonds had not been theretofore adjudicated valid and binding by the judgment of the District Court in favor of the Ohio National Life Insurance Company and against the Board of Education. It appears from the record in this case that that question was not submitted to the District Court for a decision.

3. The Supreme Court of Illinois rightfully held the decision of the District Court was not *res judicata* as to the validity of the bonds on the facts in this record.

4. The Supreme Court of Illinois did recognize and give effect to the provisions of Section 905 U. S. Statutes, 28 U. S. C. A. 687.

It is respectfully submitted that the petition for the writ should be denied.

ROYAL W. IRWIN,
Attorney for Respondents.

BENJAMIN F. LANGWORTHY,
Of Counsel.

ARGUMENT.

MAY IT PLEASE THE COURT:

I.

The Validity of the Bonds and the Validating Act of 1935 Were Not Adjudicated by United States District Court Judgment.

The subject matter of the Federal District Court suit was not the same subject matter as the suit of the Ohio National Life Insurance Company in this case.

The validity of the bonds of the Ohio National Life Insurance Company and the validity of the Validating Act of 1935 were not put in issue or adjudicated in the Federal Court suit.

The complaint and answer in that suit are set forth on pages 104 to 107 of the record. The allegation of the issuance of the bonds and the existence and payment of claims against the District in like amount were mere inducement and were admitted by the answer. The allegations of paragraph 3 were also inducement. No issue was joined on these allegations. The suit was on the unpaid coupons described in paragraph 4 of the complaint. Paragraph 5 of the complaint alleges demand for payment of interest coupons, and payment refused. The prayer of the complaint was for a judgment of $3,025.00. The answer admitted the allegations of paragraphs 4 and 5 and denied that the plaintiff was entitled to the relief prayed for in the complaint, namely: a money judgment of $3,025.00, the aggregate amount of the coupons.

The judgment appears on pages 107 and 108 of the record. It merely finds the issues for the plaintiff and

assesses its damages in the sum of $3,025.00 and gives judgment accordingly.

It does not appear from the record of the Federal Court case in evidence in this case that the plaintiff in that suit, the Ohio National Life Insurance Company, had at any time owned any of the bonds. From an order in that Federal court case (R. 108) it appears that the coupons had been offered in evidence and that no bond had been offered in evidence or produced before the court.

The subject matter of the suit of the Ohio National Life Insurance Company in this case is on coupons falling due on and after March 1, 1940 (R. 3) and on bonds Nos. 23 to 55, aggregating $33,000.00, and for money had and received and for subrogation to the rights of the claimants (R. 50).

In the case of *Cromwell* v. *County of Sac.*, 94 U. S. 351, this court had before it a case where a suit had been instituted on certain coupons pertaining to certain bonds, and judgment rendered against the plaintiff, which judgment was relied upon as an adjudication of the right of the plaintiff to recover in the suit before the court on subsequent coupons and on the bonds themselves. In this case this court held that the suit before it for consideration was upon a different cause of action from the former suit on earlier maturing coupons. In the opinion in that case this court held at 352-353:

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with

them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

"The difference in the operation of a judgment in the two classes of cases mentioned is seen through all the leading adjudications upon the doctrine of estoppel."

Since the validity of the bonds, the Validating Act of 1935, and the coupons in suit here were not adjudicated in the Federal District Court case, that judgment was not controlling in the Circuit Court of Lake County, Illinois, or in the Supreme Court of Illinois. The said case of *Cromwell* v. *County of Sac* is a leading case in this court and has been cited as a leading case in many state courts and it is believed has been followed consistently by the courts of Illinois and other states for many years.

It is believed that when the second action between the same parties is upon a different cause of action, claim or demand, it is well settled that the judgment in the first suit operates as an estoppel only as to the point or question actually litigated and determined and not as to other matters which might have been litigated and determined. In such cases the inquiry must always be as to the point or question actually litigated and determined in the original action and the burden of proof is on him who invokes the estoppel.

It is quite conceivable that the Federal District Court was of the opinion (as the Circuit Court of Lake County was in this case), that, inasmuch as the Board of Education admitted the allegations of the complaint that it received the $54,000.00 and used the $54,000.00 to pay a like amount of claims against it, that it should pay interest on the amount. It is likewise conceivable that the Federal District Court was of the opinion that the amount of the coupons was an admission of the value of the use of the money, or the proper measure of damages.

II.

No Reviewable Federal Question Was Presented to the Illinois Courts by Petitioners Small and Inglesh.

Petitioners Small and Inglesh no where in the Circuit Court of Lake County allege any right asserted by virtue of any judgment recovered by themselves or their ancestor, Len Small, or by the Ohio National Life Insurance Company. While they allege they succeeded to the rights of their brother and their father they no where allege they derived any right in their property from the Ohio National Life Insurance Company judgment (R. 44, 45, 46 & 47).

The first time privity between petitioners Small and Inglesh and Ohio National Life Insurance Company is mentioned in this record and the claim put forward that the District Court judgment is available as an estoppel in favor of Small and Inglesh, is in the petition for rehearing filed in the Supreme Court of Illinois (R. 181).

It is well settled that an estoppel by judgment or by verdict can only be availed of by the parties to the judgment and their privies. There is no basis of fact in this case to classify petitioners Small and Inglesh in privity with Ohio National Life Insurance Company in the District Court case. They have failed to show any right they derived from the Insurance Company or that the Insurance Company sued on coupons for their use.

Black on Judgments, Section 549.
Schafer v. *Robillard*, 370 Ill. 92, 100.

It is elementary that a party cannot call upon a court of review to pass upon a question that was not presented to the trial court for decision.

Ludewick v. *Ludewick*, 279 Ill. 26.

Neither will a court of review pass on a question raised for the first time in the petition for rehearing.

Gaines v. *Williams,* 146 Ill. 450, 459.

III.

Where the State Court Accords the Federal Court Judgment the Same Effect It Accords Judgments of Its Courts of Equal Authority the Writ Will Be Denied.

The Supreme Court of Illinois accorded the same effect to the District Court proceeding and judgment that it accords to like proceedings of Illinois courts of equal authority.

In the case of *Dupasseur* v. *Rochereau,* 88 U. S. 130 at 135, this court held:

> "No higher sanctity or effect can be claimed for the judgment of the Circuit Court of the United States rendered in such a case, under such circumstances, than is due to the judgments of the State courts in like case and under similar circumstances."

In the case of *Crescent Live Stock Company* v. *Butchers' Union,* 120 U. S. 141, at 147, this court holds:

> "It may be conceded then, that the judgments and decrees of the Circuit Court of the United States sitting in a particular state in the courts of that state, are to be accorded such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority."

IV.

State Law Controls.

Unless there is an estoppel that otherwise binds the respondents the Illinois state law is the controlling rule of decision in this case as to both substantive and procedural rights of the parties.

Erie R. Co. v. *Tompkins*, 304 U. S. 64.
Huddleston v. *Dwyer*, 88 L. Ed. 933.

It must be conceded the petitioner, Insurance Company, for reasons, which no doubt seemed adequate, elected to bring this action in the state court. It did bring its first action in the District Court of the United States and in that action it declared on certain unpaid coupons without identifying those coupons with any *particular bonds*, and without disclosing in *that* record that it owned any of the 54 bonds. Having declared on that record and offered it in evidence in the state court case, it then became the function of the state court to decide the proper effect of the evidence. It must be conceded that *was* the proper function of the state court. The first question was whether the *two* cases were on the *same* subject matter. Not *similar* subject matters. The state court made the decision which happens to be supported by a decision of this court "on all fours", which decision of this court is one of its most widely cited and followed decisions. Nevertheless, it is suggested the state court in making that decision was acting within its jurisdiction and function and that decision is controlling here regardless of whether it was deciding a substantive or a procedural question of law. It was state law. Its decision was not only supported by *Cromwell* v. *County of Sac.*, 94 U. S. 351, but by a long line of decisions of the courts of many of the 48 states.

including Illinois. It next became the function of the state court to examine the record of the United States Court to ascertain just what questions were made an issue and passed upon in that record and to give effect accordingly. This the state court did. It acted within its proper function and jurisdiction. It was the court the petitioner had chosen of its own volition for its own reasons. It is confidently asserted the state court was controlled by state law. At least it was applying state law. Its decision is controlling here. Moreover, it is of no consequence whether the state court in its decision assigns the right reason or the wrong reason for its decisions. It is the decision that is important. Petitioners cannot assign the reason given in the opinion as error. Strictly speaking, the District Court of the United States is *not* the *final* tribunal to decide whether a state law is within the constitutional powers of the legislature—The particular act in question is one on which the Supreme Court of Illinois has the last word in that regard. That is all the particular sentence was intended to mean in this opinion, as clearly appears from the reading of the whole opinion.

The burden was on the petitioner to show the Federal Court case was on the same subject matter as the present case or that the legality of the petitioner's bonds was an issue in the Federal Court case and that issue was actually decided in favor of the legality of the identical bonds of petitioner Insurance Company. The legal effect of the evidence was in the state court a question of applying state law. It is confidently asserted the decision of the state court on this issue is final and binding on all courts under *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

V.

This Writ Should Be Denied Under the Discretionary Powers of This Court.

It is not believed the record and facts in this case disclose a situation where the court should exercise its discretion to order the writ to issue. The finality of the judgment is at least questionable. The petitioners Small and Inglesh have utterly failed to present any case within this court's jurisdiction. The most that can be said for the case presented by the Ohio National Life Insurance Company is that of a bold assertion, not supported by a careful consideration of the facts in the record.

We most respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

ROYAL W. IRWIN,
Attorney for Respondents.

BENJAMIN F. LANGWORTHY,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 717

THE OHIO NATIONAL LIFE INSURANCE COMPANY, a corporation, LESLIE C. SMALL and MAY SMALL INGLESH,

Petitioners,

vs.

BOARD OF EDUCATION OF GRANT COMMUNITY HIGH SCHOOL DISTRICT NO. 124 OF LAKE COUNTY, ILLINOIS; ARTHUR H. FRANZEN, as treasurer of Grant Community High School District No. 124 of Lake County, Illinois; ARTHUR G. HIGHGATE, LADDIE RASKA, WILLIAM G. NAGLE, WILLIAM TONYAN and CHARLES BRAINARD, as members of the Board of Education of Grant Community High School District No. 124 of Lake County, Illinois; and JAY B. MORSE, as county clerk of Lake County, Illinois,

Respondents.

REPLY OF PETITIONERS TO THE ANSWER OF RESPONDENTS.

WERNER W. SCHROEDER
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A. F. BEAUBIEN,
Of Counsel.

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Respondents.

REPLY OF PETITIONERS TO THE ANSWER OF RESPONDENTS.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, The Ohio National Life Insurance Company, a corporation, Leslie C. Small and May Small

Inglesh, jointly and severally reply to the answer of respondents and say:

I.

Statement.

The suit in the United States District Court was to recover interest evidenced by coupons attached to the bonds here in question. The complaint relied expressly on the validating act and on the validity of the bonds (R. 105). The effect of the validating act was neither admitted nor denied in the answer (R. 106) which put the question in issue and placed the burden upon the plaintiff. That was the sole controverted issue decided by the District Court.

Both the Circuit Court of Lake County and the Supreme Court of Illinois ignored the judgment of the district court insofar as it adjudicated the validity of the bond issue. The Supreme Court limited the effect of that judgment to a mere prevention of the recovery back by the district of the money it had paid pursuant to the judgment.

II.

Basis of Contention that Supreme Court has Jurisdiction.

1. In this case the judgment of the Supreme Court of Illinois is as final as any judgment could ever become. If the cause were first to return to the Circuit Court of Lake County for entry of judgment in accordance with the mandate of the Supreme Court of Illinois, there would then be no question upon which a further appeal could be taken to that court as all issues have been fully argued and decided. Moreover, such a procedure would probably waive the right to petition this court.

In *People* v. *Orvis*, 374 Ill. 536, 30 N. E. (2d) 28, the judgment of the lower court from which the appeal was taken was one denying leave to the taxpayer to file objections. While the decision went into the merits of the objections, the only order that the Supreme Court there could actually enter was that the taxpayer be given leave to file his objections. The cause was in its procedural stages. Here there is no further relief which petitioners can obtain in the courts of Illinois.

2. The suit in the district court was founded on the theory that the bonds had been validated and consequently the interest coupons were collectible. The two were legally inseparable. If the bonds were not good, the coubonds were not collectible. If the bonds were valid, the coupons were good. Recovery was predicated on the validity of the bonds.

3. Petitioners, Leslie C. Small and May Small Inglesh, were not nor was their ancestor a direct party to the suit in the federal court. They undoubtedly stand on a different basis than the Ohio National Life Insurance Company, but claim the benefit of the judgment on the theory that there is sufficient privity and identity of interest.

4. The judgment of the district court was based on a complaint expressly alleging the validity of the bonds. It was not of course necessary that the judgment at law make findings of fact and law upon which it was based. The pleadings (R. 105 and 106) presented only the issue of the validity of the bonds. One of the attorneys (R. 83) who tried the case before the district court testified that the first *Orvis* case was extensively discussed; that the real point argued was the validity of the bonds and (R. 84) that the validating act set out in the complaint was

brought before the court. He also testified that the evidence established the ownership of the coupons.

The recognition of the federal court judgment by the Supreme Court of Illinois is limited entirely to a refusal to force the insurance company to return the money which it had received under the compulsion of that judgment.

5. The Supreme Court of Illinois did fail to give full faith and credit to the district court judgment as it refused to regard as adjudicated the very point which was the basis of that judgment and which is now relied on by petitioners.

6. The Supreme Court of Illinois did not recognize the district court judgment; the case of *Cromwell* v. *County of Sac*, 94 U. S. 351, does not militate against the position of petitioners. Insofar as it is relevant it supports our contention.

III.

The Question Presented.

The attempt of respondent to make a distinction between the issues involved in this cause and those involved in the District Court suit on the ground that that was a suit on coupons, while this is on the bonds and on later coupons is without substantial foundation. The legal identity of bonds and the interest coupons has been established by decisions of this court which will be alluded to in subsequent parts of this reply.

The subject matter is sufficiently identical that the adjudication of the legality of coupons establishes, as between the same parties, the legality of the bonds to which the coupons are appurtenant.

The position of Leslie C. Small and May Small Inglesh has already been referred to, and authorities on their position will be cited hereinafter. They were not required to set up and rely on the prior adjudication in their pleadings for the reason that the stipulation of the parties (R. 104) provided that either side might offer proof of any relevant facts and insist on any claim or defense brought to the attention of the court, and that such facts, claims or defense should be received and considered by the court "the same as though it were well pleaded." Moreover, it is the settled doctrine of this court that former adjudication need not be specially pleaded.

The question presented, as stated in our original petition, may in view of respondents' answer be amplified to cover the inquiry whether the Supreme Court of Illinois may destroy the effect of a prior judgment by limiting it to the money adjudged to be paid and closing its eyes to the legal foundation upon which such recovery rested.

IV.

Reasons Relied on for Allowance of Writ.

The claim of respondents that this is a different claim or cause of action proceeds, as does the opinion of the Supreme Court of Illinois, on the assumption that the coupons which represent interest are separable from the bonds themselves,—that the former may be valid and the latter void.

The pretense that the former judgment is being given effect by refusing to compel the successful party to return what he collected under the judgment is a limitation of the doctrine of former adjudication never before tolerated by this court.

Jurisdiction.

Respondents, under a similar heading of their answer, appear to admit that the decision of the Supreme Court of Illinois is final and has brought to an end any relief that may be obtained by petitioners in the courts of that state.

In *People* v. *Orvis*, 312 U. S. 705, which refused *certiorari* on the decision of the Supreme Court of Illinois in *People* v. *Orvis*, 374 Ill. 536, because of lack of a final judgment, the decision of the Supreme Court of Illinois merely granted the taxpayer the right to file objections. The pleadings had not yet been filed. Here not only have the pleadings been filed, but a full hearing has been had, and there is no other relief possible to petitioners in the courts of Illinois.

It is respectfully submitted that jurisdiction exists in this case both because of certain legal effects that inevitably followed from the judgment of the United States District Court and because of the effort of the Supreme Court of Illinois to limit that judgment to its mere monetary result.

The position of Small and Inglesh, which is hereinafter defined, is, however, different from that of The Ohio National Life Insurance Company; for which reason the petition for certiorari is joint and several.

Petitioners again jointly and severally respectfully pray that the writ of certiorari be issued herein as they have heretofore prayed in their petition.

WERNER W. SCHROEDER,
Attorney for Petitioners.

THEODORE W. SCHROEDER,
A. F. BEAUBIEN,
Of Counsel.

ARGUMENT.

MAY IT PLEASE THE COURT:

I.

The validity of the bonds and of the validating act of 1935 were adjudicated by the United States District Court

Respondents' first contention that the validity of the bonds was not adjudicated cannot stand in view of the pleadings in the Federal District Court suit and the evidence pertaining to that case. Paragraph 3 of the complaint in the district court alleges the ruling in the first *Orvis* case and the passage of the validating act of 1935 which is set out in the paragraph, and then avers that by reason of said act all proceedings had in connection with the issuance of said bonds are expressly validated, and said bonds and the interest coupons thereto attached are valid and legally binding obligations of the defendant district. That sentence presented the issue which the district court considered and adjudicated (R. 83 to 84).

The answer of the district, after admitting the issuance of the bonds and failure to pay interest, neither admitted nor denied the validity of the validating act, and neither admitted nor denied that the bonds and interest coupons were valid and legally binding on the defendant district, which raised an issue and placed the burden of proof of the validity of the bonds and coupons on the plaintiff.

Recovery depended entirely on the effectiveness of the validating act of 1935. Without a ruling on that issue in

favor of plaintiff there could have been no money judgment.

It is not now denied by the district, nor in the opinion of the Supreme Court of Illinois, that those coupons were appurtenant to bonds upon which this suit is based and to which are attached later coupons upon which recovery is also sought.

Respondents now claim that the judgment, which necessarily upheld the validity of some of the coupons, is not *res judicata* of the validity of the bonds themselves or of subsequent coupons. They cite *Cromwell* v. *County of Sac*, 94 U. S. 351. That case has been misread by respondents. There in a previous suit upon interest coupons they had been held invalid, and since the plaintiff had not shown that he was a purchaser for value before maturity recovery was denied. The second suit was brought by the same plaintiff upon the bonds themselves and later coupons. In that action he offered to show that he was a purchaser for value before maturity. This court held that as to the validity of the bonds and coupons the adjudication in the earlier suit was conclusive against and binding on the plaintiff. The court said (page 359; 94 L. Ed. at 200):

> "Reading the record of the lower court by the opinion and judgment of this court, it must be considered that the matters adjudged in that case were these: that the bonds were void as against the County in the hands of parties who did not acquire them before maturity and give value for them, and that the plaintiff, not having proved that he gave such value, was not entitled to recover upon the coupons. *Whatever illegality or fraud there was in the issue and delivery to the contractor of the bonds affected equally the coupons for interest attached to them. The finding*

and judgment upon the invalidity of the bonds, as against the County, must be held to estop the plaintiff here from averring to the contrary." (Italics ours.)

But on the second issue, whether he was a purchaser for value before maturity, the court said:

"If, therefore, the plaintiff received the bond and coupons in suit before maturity for value, as he offered to prove, he should have been permitted to show that fact. There was nothing adjudged in the former action in the finding that the plaintiff had not made such proof in that case which can preclude the present plaintiff from making such proof here. The fact that a party may not have shown that he gave value for one bond or coupon is not even presumptive, much less conclusive, evidence that he may not have given value for another and different bond or coupon. The exclusion of the evidence offered by the plaintiff was erroneous, and for the ruling of the court in that respect the judgment must be reversed and a new trial had."

That case, rather than being an authority against petitioners, is one in their favor. It makes the significant holding that as the invalidity of the coupons was adjudged in the former action, that ruling is conclusive as to the invalidity of the bonds and of later coupons in a subsequent action.

In the later case of *Bissell* v. *Spring Valley Twp.*, 124 U. S. 225, 31 L. Ed. 411, plaintiff had previously brought action upon coupons which had been attached to certain municipal bonds. In that action it had been adjudged that the bonds to which they were attached were void because of certain informalities. Later he brought action upon other of the coupons attached to the same bonds. The plaintiff relied, as do respondents here, on *Cromwell* v. *Sac County*, claiming that the second was a different

cause of action. That contention was denied by this court through the same justice who had written the *Cromwell* opinion. It was said (page 236; 31 L. Ed. at 415):

> "There is nothing in that decision which can be made to support the contention of the plaintiff in this case. In the former action against the present defendant the adjudication was that the bonds themselves were never signed by the proper officers required by the statute of the State to sign them, and therefore they were not legal obligations of the Township. Their invalidity equally affected the coupons attached to them, and not merely those in suit, but all others. If the plaintiff could give any evidence consistent with that adjudication there would be no objection to his doing so, and the former action would not estop him; but the bonds being found to be invalid and void, he is precluded from attempting to show the contrary, either of the fact of their wanting the signature of the county clerk, or of the law that for that reason they were not binding obligations of the municipality. *The fact and the law are adjudged matters between the parties, and not open, therefore, to any further contest.*" (Italics ours.)

Later in *Southern Pacific Railroad Company* v. *U. S.*, 168 U. S. 1, 42 L. Ed. 355, the same principle was followed and applied in a suit involving title to lands. It was stated generally (page 48; 42 L. Ed. at 377):

> "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

In that case different lands were involved than in the prior judgment, but both cases involved certain maps of definite location. To a contention similar to that now made by respondents, this court replied (page 54; 42 L. Ed. at 379):

> "It is also said that the decision in the former cases concluded, at most, only the question of title in respect of the lands there in controversy. This cannot be correct when the lands in both suits have a common source of title, and the title depends upon the existence or nonexistence of the same fact or facts. If the accepted maps filed by the Atlantic & Pacific Railroad Company in 1872 sufficiently located the line of that company, it could not possibly be that they were valid maps of definite location as to part of the lands appertaining to that line, and not maps of that character in respect of other lands embraced by it. Consequently, the former judgment, while unmodified, determined the character of the maps, as between the United States and the Southern Pacific Railroad Company."

In the same case the court ruled on the contention, also here made (against Small and Inglesh), that estoppel needs to be pleaded. The court said (page 59; 42 L. Ed. at 380) that the record and judgment in the former case were admissible without being specially pleaded and stated:

> "Mr. Greenleaf correctly says that 'the weight of authority, at least in the United States, is believed to be in favor of the position, that where a former recovery is given in evidence, it is equally conclusive, in its effect, as if it were specially pleaded by the way of estoppel.' 1 Greenl. Ev. 531. This view is in accord with the decisions of this court above cited."

It has also been pointed out above that the stipulation of the parties made such pleading unnecessary. Of course, The Ohio National Life Insurance Company pleaded the former adjudication in its original complaint.

The lower federal courts have repeatedly followed the doctrine exemplified by those decisions of this court in holding that a judgment rendered in a suit upon coupons is conclusive upon the parties in a later suit upon the bonds themselves or upon subsequently maturing coupons. *Edwards* v. *Bates County*, 55 Fed. 438; *Gorham* v. *Broad River Twp.*, 109 Fed. 776; *Aetna Life Insurance Company* v. *Board*, 117 Fed. 82; *Hickman* v. *Town of Fletcher*, 195 Fed. 908; *Fitch* v. *Stanton*, 190 Fed. 310. In the last case a contention similar to that made by respondents was answered as follows:

> "The estoppel against appellant resulting from that judgment is not dependent upon the demand involved in this suit being the same as that involved in that suit; but is dependent upon the questions here involved being identical with those involved in, and determined by, that suit."

There the first suit was on coupons, the second suit on later maturing coupons.

The decisions of this court conclusively dispose of respondents' contention that because earlier coupons only were sued on in the former action the judgment is not binding in its determining effect in this suit upon later coupons and the bonds themselves.

These cases also demonstrate that the Supreme Court of Illinois did not give effect to the judgment of the district court when it limited that judgment in its effect to the recovery of the money represented by the coupons but refused to recognize the indispensable foundation of that recovery—the validity of the bonds.

Respondents (page 17) suggest that the recovery in the federal court may have been upon money had and

received or for the value of the use of money rather than upon the coupons themselves. But that contention is negative by everything in the record, even by respondents' assumptions in other parts of the answer. The complaint in the federal district court in paragraph 4 (R. 106) describes the interest coupons *sued on*. The fifth paragraph alleges that demand was made for the payment of interest coupons and that payment was refused. Those pleadings were narrowly limited to recovery on the interest coupons. There appears to have been no common count or any other general prayer for judgment which would have allowed recovery for money had and received.

It consequently appears that the pleadings admit of no other construction than that recovery was had upon the interest coupons, and that this recovery was based upon the validation of the bonds themselves, which was properly pleaded and which was the only issue raised by respondents' answer in that cause. It is impossible to look upon the proceedings in that case in any other way than as a determination of the validity of these bonds.

II.

Position of Small and Inglesh.

The petition for certiorari filed in this court is joint and several in form because of a realization that the position of Small and Inglesh is different from that of the Ohio National Life Insurance Company.

Small and Inglesh were not plaintiffs in the suit brought in the Federal District Court nor do they claim that they have derived any bonds from the Insurance Company.

They must rely upon the identity of their legal rights

with those of that company. In *United States* v. *California Bridge & C. Co.*, 245 U. S. 337 at 341, 62 L. Ed. 332 at 336, this court said:

> "The doctrine of estoppel by judgment, or *res judicata*, as a practical matter, proceeds upon the principle that one person shall not a second time litigate, with the same person or with another so identified in interest with such person that he represents the same legal right, precisely the same question, particular controversy, or issue which has been necessarily tried and finally determined, upon its merits, by a court of competent jurisdiction, in a judgment *in personam* in a former suit."

citing a number of prior decisions of this court.

The rights of Small and Inglesh are dependent upon the same legal right and precisely the same question as that underlying the claim of the Ohio National; their bonds depend for validity upon the same basis of law and fact as that upon which the demand of the Insurance Company in the federal court rested.

It was with the belief that their interests were sufficiently identical with those of the Insurance Company that Small and Inglesh joined in this joint and several petition for certiorari. If, however, the court were of the opinion that those legal rights are not sufficiently identical the petition filed in this cause must be regarded as the several petition of the Insurance Company.

The contention that Small and Inglesh did not specially plead the former adjudication has already been answered in the prior division of this reply.

III.

The State Court did not accord the Federal Court judgment the same effect it accords judgments of its own courts of equal authority.

The doctrine which petitioners claim is properly applicable here, that the decision by judgment upon a certain point is conclusive between the parties in all subsequent litigation between them, has been repeatedly recognized and applied by the Supreme Court of Illinois in reference to judgments of its own courts. Instances of such cases are to be found in *Winkelman* v. *Winkelman,* 310 Ill. 568; *Harding Company* v. *Harding,* 352 Ill. 417; *Wright* v. *Griffey,* 147 Ill. 496, and many other cases.

Petitioners' complaint is that the doctrine applied by the courts of Illinois to its own judgments has not been given effect in the case at bar, due in part to the fact that the Supreme Court of Illinois has confused the doctrine of former adjudication with that of "rule of decision."

IV.

The state court cannot deprive this court of jurisdiction by a holding which is obviously erroneous.

It is contended by respondents that the finding of the Supreme Court of Illinois that the issues here involved were not passed on by the district court was within the jurisdiction of that court and is conclusive under the ruling of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64.

Undoubtedly in the first instance the Supreme Court of Illinois was called upon to express its opinion of the effect of that judgment, but if, as we contend, its construction of that record is palpably wrong, it cannot deprive

this court of jurisdiction or the petitioners of their rights by such an erroneous ruling. If that were possible, the error of a state court could always defeat the jurisdiction of this court. Such an idea involves an inherent contradiction. It is the error of the court of Illinois in refusing to give the federal court judgment its proper and obvious effect which is cause for complaint and the ground upon which the jurisdiction of this court must rest.

V.

The issuance of the writ is respectfully requested.

It is respectfully suggested that the *Cromwell* case does not support respondents' position in this cause. That the validity of the bonds was put in issue by the prior suit on the coupons cannot be denied. This petition is not, as stated by respondents, a "bold assertion" but a sincere effort to recover from the School District the money which it has undeniably received and which it retains to its own benefit.

Petitioners again jointly and severally pray that the petition for certiorari be granted.

Respectfully submitted,

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